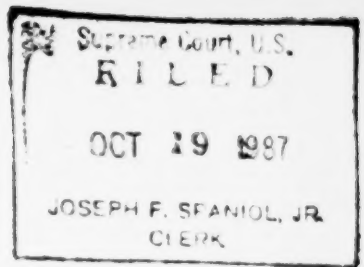


87-642



No. 87-_____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES W. LEE, RALPH A. EKLUND
and CORA CARR,

Petitioners,

v.

EKLUTNA, INC., COOK INLET
REGION, INC., UNITED STATES OF
AMERICA, SECRETARY OF THE
INTERIOR, and DIRECTOR,
BUREAU OF LAND MANAGEMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Jurisdiction under the Quiet Title Act of 1972 is limited to suits against the United States concerning land in which the United States claims an interest, 28 U.S.C. §2409a(a), (e). In 1979 the United States disclaimed all interest in certain lands when it patented lands in fee (and not in trust) to private entities under 43 U.S.C. §1613. Petitioners thereafter sued these private patentees to establish petitioners' superior title under the homestead laws, 43 U.S.C. §161 et seq, invoking jurisdiction under 28 U.S.C. §1331.

Was it proper for a Court of Appeals to create a novel requirement that homestead claimants must sue the United States under the Quiet Title Act as an indispensable party, in whose absence homesteaders' actions against private

patentees could not proceed, thus extending to private party patentees the benefit of the Quiet Title Act's statute of limitations, 28 U.S.C. §2409a(g)?

2. The Secretary of the Interior misrepresented the legal status of disputed lands when asked by petitioners in 1959. If petitioners must sue under the Quiet Title Act on any of their causes of action, is that Act's statute of limitations, 28 U.S.C. §2409a(g), tolled because of the government's active concealment that the lands were subject to entry under 16 U.S.C. §818?

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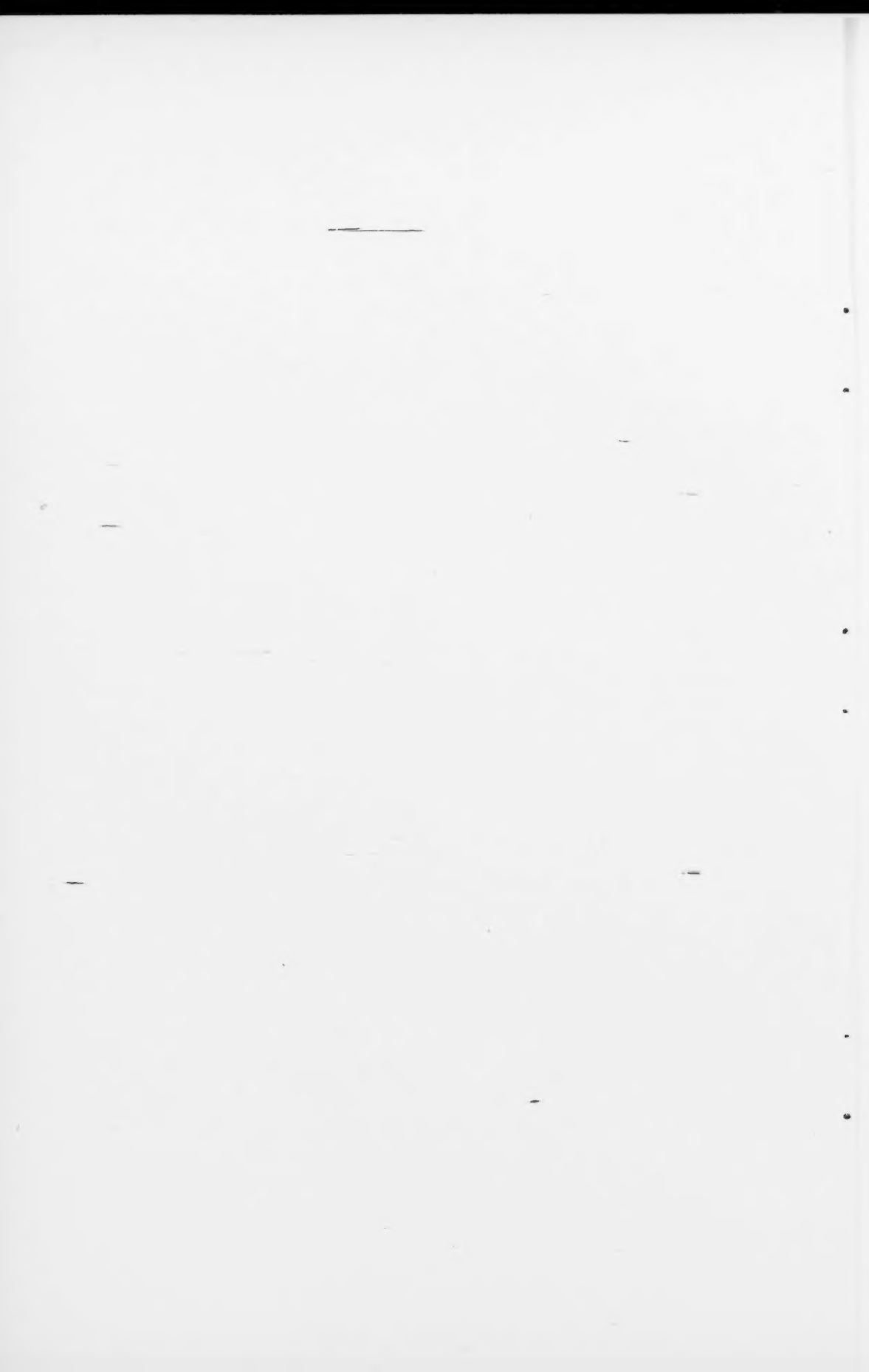
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PETITION FOR WRIT OF CERTIORARI

Petitioners James W. Lee, Ralph A. Eklund and Cora Carr respectfully pray that a writ of certiorari issue to review the judgment and Second Amended Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding.

OPINIONS BELOW

The Second Amended Opinion of the Court of Appeals is reported at 809 F.2d 1406 and is set forth in the Appendix, page 2a. The Amended Opinion of the United States District Court for the District of Alaska is reported at 629 F.Supp. 721 and appears in the Appendix, page 16a.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered a judgment on March 10, 1987. An order denying a petition for

rehearing from its Second Amended Opinion was entered July 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES

This Petition involves the following statutes: Federal Power Act of 1920 (as amended), 16 U.S.C. §818; Quiet Title Act of 1972 (as amended), 28 U.S.C. §2409a; 43 U.S.C. §161, §164; Alaska Native Claims Settlement Act §§2, 14(g), 22(b), 43 U.S.C. §§1601, 1613(g), 1621(b), 1632(a); AS (Alaska Statutes) 9.10.230. These statutes are set out in the Appendix.

STATEMENT

Petitioners^{1/} in the late 1950s staked separate homestead claims to 160--acre tracts in the Eagle River Valley

1. Mrs. Carr's claim was filed by her late husband, Warren Carr. The acts of Warren Carr will be referred to herein as the acts of petitioner Cora Carr.

in Alaska. 43 U.S.C. §§161, 164 provide that a person shall be entitled to enter 160 acres of land and, upon completion of residence, cultivation and improvement requirements, shall be given a patent for the lands entered. Petitioners performed the statutory requirements for 160-acre tracts. CR-87; CR-80; CR-79, CR-218.

Parts of each of these tracts were, prior to 1952, designated as "power-sites" by the Department of the Interior. 16 U.S.C. §818 (Federal Power Act of 1920, §24) ("§24 FPA") provides in part:

Whenever the [Federal Power] Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination

shall declare such lands open to location, entry, or selection, . . .

The language emphasized by petitioners was intended to assure that the "not be injured" determination results in immediate opening of such lands to homestead entrymen. Cong. Rec., Vol. 58, pp. 2242-2243 (1919). Cf. Reeves v. Andrus, 465 F.Supp. 1065 (D.Alaska 1979).^{2/}

In 1952 the Federal Power Commission determined that the lands here involved will not be injured or destroyed for purposes of power development by location or entry under the public land laws, subject to the provision of Section 24 of the Federal Power Act.

CR-108, Exhibit D to part (D). This was the "not be injured" determination referred to in §24 FPA, above. Although petitioners eventually received patents to parts of their 160-acre tracts, the

2. There was no legal or practical reason why petitioners' entry had to await an engineering survey. Petitioners refrain from elaborating on this subject because it does not appear material to the issues of this petition.

BLM refused petitioners their full grant contained in 43 U.S.C. §164.

Petitioners in 1959 sent a letter asking the Secretary of the Interior to look into the matter, the BLM having advised petitioners that the land was withdrawn until the Secretary would release it to them. CR-108, Ex. K to part (D). An assistant secretary responded on behalf of the Secretary,

There has been some confusion over the fact that although the Federal Power Commission had indicated that it was no longer interested in the reserve, the reserve had not been opened to entry. Any misinformation is sincerely regretted but the fact remains that any settlement of the reserved lands cannot be recognized under existing law . . . You may rest assured that we are not going to take any arbitrary action.

CR-108, Exhibit L to part (D). Lee, Ek-lund and Carr were ignorant of the actual terms of §24 FPA. CR-114, Affidavit; CR-EK-12, Affidavit; CR-159, Affidavit.

They relied on the Secretary's representations as to the legal status of the lands. Id. Petitioners did not suspect that a statutory violation had caused the denial of their claims.

Upon discovering their true rights years later, petitioners in 1979-1982 sued Eklutna and Cook Inlet, to which entities the lands had then been patented pursuant to the provisions of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §1601 et seq. They filed alternative causes of action against the United States and federal officers. Jurisdiction was grounded on federal questions, 28 U.S.C. §1331. Alternatively, petitioners invoked 28 U.S.C. §2409a and 5 U.S.C. §702 to the extent these statutes might apply.

Petitioners invoked rights and remedies which are settled in federal law,

which petitioners briefly review here because the courts below did not do so. When a claimant has complied with the requirements of the granting statute, he becomes vested with the equitable title to public land, Wyoming v. United States, 255 U.S. 489, 497-498, 507 (1921), of which title "he could not subsequently be deprived". Shepley v. Cowan, 91 U.S. 330, 338 (1875).

Beginning at least with Stark v. Starrs, 6 Wall. 402, 419 (1867), the law has been that if the government fails to issue a patent to the rightful owner but later conveys the land to subsequent third parties, that conveyance is charged with the prior claimant's equitable title. The patentee will be declared a constructive trustee and will be required by a court of equity to convey the legal title to the prior claimant. Wyoming,

supra, at 255 U.S. 503. In 1871, this was declared to be the "settled doctrine of this court", Johnson v. Towsley, 80 U.S. (13 Wall.) 72, 85 (1871). In Duluth & Iron Range R. Co. v. Roy, 173 U.S. 587, 590 (1899) this Court said the principle was "too well established to need argument to support or citation of authority".

The Secretary's failure to declare the land open to entry could not prevent petitioners from receiving the benefits of §24 FPA. A plaintiff's right to relief is measured by what would have occurred had the BLM timely obeyed the law. Payne v. New Mexico, 255 U.S. 367, 371 (1921), Wyoming at 255 U.S. 503-504, Van Wyck v. Knevals, 16 Otto. 360, 367 (1882), The Yosemite Valley Case, 15 Wall. 77, 91 (1872). Remedy is given accordingly:

If, however, those officers mistake the law applicable to the facts or misconstrue the statutes and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. The court in such a case merely directs that to be done which those officers would have done if no error of law had been committed.

Lee v. Johnson, 116 U.S. 48, 49 (1885).
Accord, Johnson v. Towsley, 80 U.S. 72, 86 (1871), Bohall v. Dilla, 114 U.S. 47, 51 (1884), Moore v. Robbins, 96 U.S. 530, 535-536 (1877), Duluth, supra, Garland v. Wynn, 20 How. 6, 8 (1857), Lytle v. Arkansas, 9 How. 314, 332 (1850), Ard v. Brandon, 156 U.S. 537, 542-543 (1895), Great Northern Ry. v. Reed, 270 U.S. 539, 546 (1926).^{3/}

3. These judicially-acknowledged remedies would exist even had ANCSA contained no savings provisions such as §§14(g) and 22(b). Wilcox v. Jackson, 38 U.S. 498, 513 (1839), Payne v. Central Pacific, 255 U.S. 228, 238 (1921). The creation of an additional, pre-patent remedy in the Quiet Title Act did not affect existing remedies against private parties. See Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 n. 66 (1982). Federal Marine Terminals, Inc. v. Burnside Shipping Co., Ltd., 394 U.S. 404, 412 (1969).

In the district court no party contended that the United States was an indispensable party to petitioners' causes of action against the private defendants, Eklutna and Cook Inlet. The district court confirmed that the United States had disclaimed any interest in the lands. There was no contention or finding that a trust existed. The district court held correctly that the Quiet Title Act of 1972 ("QTA") did not insulate private parties against petitioners' causes of action, citing Economic Development and Industrial Corp. v. United States, 720 F.2d 1, 4 (1st Cir. 1983), 629 F.Supp. 727. The district court, however, dismissed some of petitioners' causes of action on the theory that they failed to state a claim for relief, and dismissed others on the theory that the court lacked jurisdiction. 629 F.Supp.

721. There was no trial.

The Court of Appeals affirmed.^{4/} It did so on the theory, rejected by the district court, that the QTA barred all petitioners' causes of action against private entities. The Court of Appeals held that, though patent had issued to third parties and the United States neither held nor claimed an interest in the land,

Lee, Eklund and Carr can only properly establish their asserted entitlement to the disputed lands in direct proceedings against the United States. See McIntyre v. United States, 568 F.Supp. 1, 2-3 (D.Alaska 1983), aff'd 789 F.2d 1408 (9th Cir. 1986). The United States is therefore an indispensable party to this action.

809 F.2d at 1411. It further held that

4. On appeal Lee, Eklund and Carr disputed the district court's theories: (1) that ANCSA pre-empted this Court's prior decisions on constructive trust relief; (2) that ANCSA §14(g) was not intended to protect homesteaders; and (3) that 28 U.S.C. §2409a(g) barred petitioners' alternative claims against federal defendants under 28 U.S.C. §2409a and ANCSA §22(b). Petitioners further disputed the district court's statements that petitioners "signed compromise agreements" and that Eklund and Carr did not exhaust their administrative remedies.

such relief must be sought under the QTA. 809 F.2d at 1409. Relying on these conclusions, the Court of Appeals reasoned that the QTA's 12-year statute of limitations had run in favor of the federal defendants. It further held that claims under ANCSA §22(b) were governed by 28 U.S.C. §2409a(g). It did not reach the other theories offered by the district court. 809 F.2d 1406.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has extended the Quiet Title Act's statute of limitations to title actions in which the United States claims no interest. Specifically, the United States claims no interest in the lands claimed by petitioners. The First Circuit has recognized that this fact renders the QTA's statute of limitations, 28 U.S.C. 2409a(g), inapplicable, Economic Development, supra, but the

Ninth Circuit has declined to heed the QTA's limitation to "real property in which the United States claims an interest", 28 U.S.C. §2409a(a).

Petitioners seek certiorari review because proper identification of those actions which §2409a(g) does not bar is at least as important as determining those which are barred by this "condition on the waiver of sovereign immunity", as in Block v. North Dakota, 461 U.S. 273, 287 (1983) and in United States v. Mottaz, 106 S.Ct. 2224 (1986). The Ninth Circuit's ruling, if left uncorrected, empowers courts to confer the benefits of the QTA's statute of limitations on private transferees, merely by declaring the United States to be an indispensable party without a demonstration that the United States has any interest in the property, and without examining the pre-

requisites to dismissal expressed in Fed. R. Civ. Proc. Rule 19. The result is extinguishment of rights to enforce valuable interests in land unrelated to the merits of those claims.

Certiorari is appropriate because decrees can be entered in such cases settling rights, as between private parties, which would not affect federal interest in the land which is the subject of the action. It is the policy of the law that no action be dismissed for lack of an "indispensable party" unless a court clearly cannot proceed without him. Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102, 119 (1968). Courts will "strain hard" to avoid dismissal, even if an absent party claims an interest in the subject matter of the action, Bourdieu v. Pacific Oil Co., 299 U.S. 65, 70 (1936), though in this case

it was undisputed that this threshold requirement for indispensable party analysis was not met. The result is a pure windfall to third party patentees, unrelated to petitioners' right to title.

The Court of Appeals' decision is contrary to the existing decisions of this Court, is unsupported by the QTA, is opposite to the First Circuit's ruling on the same issue under the QTA, burdens the United States with defending its patentees' titles, and nullifies the savings provision of ANCSA §14(g). This Court should grant review the because the Ninth Circuit's error is plainly presented and because its destructive consequences plainly appear.

I

PETITIONERS NEED NOT SUE THE
UNITED STATES TO ESTABLISH THEIR
HOMESTEAD TITLES

A. Petitioners' Claims Against Private
Parties Do Not Require the United States
to be a Party Defendant.

The Ninth Circuit's belief that the United States is an indispensable party was gratuitous: (1) the Ninth Circuit did not question the district court's finding that the United States had disclaimed all interest, 629 F.Supp. 726; (2) petitioners' prayers for relief asked that Eklutna/Cook Inlet be required to convey title directly to petitioners (Lee's Third Amended Complaint, CR-158, page 11; Eklund's Second Amended Complaint, CR-138, page 11; Carr's Second Amended Complaint, CR-146, page 11); (3) the United States did not argue in the district court that it was an indispensable party, though it was already before

the district court on separate causes of action; (4) nor, indeed, did Eklutna/Cook Inlet claim in the district court that the United States was an indispensable party to petitioners' causes of action against Eklutna/Cook Inlet.

Since the United States "claims [no] interest relating to the subject of the action", a decree would not "impede [its] ability to protect that interest", Fed. Rules Civ. Proc., Rule 19(a), 28 U.S.C., the United States' jurisdictional "absence" fails to meet the threshold requirement for dismissal. Provident at 390 U.S. 114, 119. This Court has required a showing that the United States is the real party in interest, before requiring that the United States be a party. Arizona v. California, 298 U.S. 558, 571 (1936), Minnesota v. Hitchcock, 185 U.S. 373 (1902), Kansas v. United

States, 204 U.S. 331, 341 (1907), Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 691 n. 11 (1949). Cf. United States v. Beebe, 127 U.S. 338 (1888) (sovereign anti-laches doctrine applies only if United States is real party in interest). Those decisions are applicable here.

Even had a federal interest existed, however, the Court of Appeals could not dismiss the action without considering whether a decree could be written which would protect such interest. Provident at 390 U.S., 115, Bourdieu at 299 U.S. 70. The Ninth Circuit considered none of the other criteria required by Rule 19(b): prejudice to interests of any party, whether plaintiff will have a remedy if the action is dismissed, whether a judgment entered in the United States' absence would be adequate. Had the Ninth

Circuit made such inquiry, it could have found no reason to dismiss Petitioners' actions against Eklutna/Cook Inlet.

It is apparent that a judgment entered solely as between Petitioners and Eklutna/Cook Inlet will be adequate. That judgment need only order that Eklutna convey the legal title to Petitioners. No act of a federal officer is required. On the other hand, no remedy has been shown available to petitioners if the Ninth Circuit's dismissal is allowed to stand. The Ninth Circuit's ruling merely creates a disfavored windfall by preventing a court from reaching the merits of petitioners' claims. Provident at 390 U.S. 112.

The Court of Appeals' novel doctrine is bad judicial policy. It needlessly "restrict[s] access to federal courts", Mottaz at 106 S.Ct. 2231 n. 9. The no-

tion that the United States can "lend" the shield of sovereign immunity to a private patentee has no place in federal law and derives no support from any past decisions of federal courts -- with the sole exception the spurious decision in McIntyre (below).

The Ninth Circuit's decision imposes a needless burden of litigation on the Department of Justice. It encumbers the United States with an unprecedented and costly obligation to defend its patentees' titles. The party with the actual adverse claim of interest, the patentee, would not control the litigation, since that control would be in the United States. Courts will be deprived of the concrete adversity of interests which gives focus to litigation, since the party obligated to defend title, the United States, has no interest in the outcome.

The Ninth Circuit's decision is unjust. It has deprived petitioners of valuable property by misapplication of a concept which bears no relation to the merits of petitioners claims or to the interest of any person.

B. This Court Has Already Decided That the United States Is Not A Necessary Party in Suits Between Private Parties.

The QTA coordinates with existing law that a person claiming under the public land laws need not and may not sue the United States to establish his superior title, after the United States has conveyed the land by patent. He should sue the patentees directly.

The leading case is Daniels v. Wagner, 237 U.S. 547 (1915), which, like the present case, was a suit for constructive trust relief against a private patentee because of the Secretary's disregard of statute.

In addition in the brief for the appellee in this case various mixed contentions of law and fact Some of them we think too obviously devoid of merit to require anything but statement. For instance, the contention that because a patent of the United States is involved, therefore the United States is a necessary party.

237 U.S. at 567. Prior to that, in In Re Emblen, 161 U.S. 52 (1896) this Court held that the only remedy available to a wronged public lands claimant, after issuance of patent to another party, is a constructive trust action against the patentee.

The patent conveys the legal title to the patentee, and cannot be revoked or set aside, except upon judicial proceedings instituted in behalf of the United States. The only remedy of Emblen is by bill in equity to charge Weed [the patentee] with a trust in his favor. All this is clearly settled by previous decisions of this court, including some of those on which the petitioner most relies. Johnson v. Towsley, 13 Wall. 72; Moore v. Robbins, 96 U.S. 530; Marquez v. Frisbie, 101 U.S. 473; Smelting Co. v. Kemp, 104 U.S. 636; Steel v. Refining Co., 106 U.S. 447,

1 Sup. Ct. 389; Cattle Co. v. Becker, 147 U.S. 47 13 Sup. Ct. 217; Turner v. Sawyer, 150 U.S. 578, 586, 14 Sup. Ct. 192.

161 U.S. at 56-57; emphasis supplied. Again, in Bockfinger v. Foster, 190 U.S. 116, 125-126, 23 S.Ct. 836 (1903) this Court reaffirmed the

principle that after the title to public lands has passed from the United States, that is, after the Land Department has performed the last act in the series necessary to pass the title of the government, the courts will, as between parties asserting conflicting rights in such lands, determine, by appropriate judicial proceedings, which of the parties has the better right.

Emphasis supplied. Daniels, Emblen and Bockfinger flatly contradict the new rule announced by the Ninth Circuit. See also Knapp v. Alexander-Edgar Lumber Co., 137 U.S. 132 (1915), Shepley v. Cowan, 91 U.S. 330, 338 (1875), Johnson v. Towsley, 80 U.S. 72 (1871), Silver v. Ladd, 74 U.S. 219 (1869), Lytle, supra, Moore v.

Robbins, 96 U.S. 530 (1878), Duluth & Iron Range Ry. Co. v. Roy, 173 U.S. 587 (1899), Cornelius v. Kessel, 128 U.S. 456 (1888). This Court in Bockfinger confirmed that this principle includes claims under the homestead laws. 23 S.Ct. at 840. See also Ard v. Brandon, 156 U.S. 537 (1895), Great Northern Ry. Co. v. Reed, 270 U.S. 539 (1926).

These remedies are post-patent remedies, while the QTA deals solely with claims to land which the United States retains in public ownership.

The Court of Appeals relied on a single case, McIntyre v. United States, 568 F.Supp. 1 (D.Alaska 1983), affirmed on other grounds, 789 F.2d 1408 (9th Cir. 1986). McIntyre was a district court decision which rested its conclusion on the pleadings peculiar to that case. 568 F.Supp. at 203. Petitioners' own

pleadings include demands for title directly from Eklutna/Cook Inlet. See above, page 16.

The sole authority relied on in McIntyre was Kale v. United States, 489 F.2d 449, 454 (9th Cir. 1973). Kale did not purport to decide that relief was available only by suing the United States. In fact, Kale relied on Duluth, supra, one of this Court's decisions affirming the right to relief solely as between private parties.

The Court of Appeals' ruling necessarily implies that all decisions such as Ard v. Brandon, Johnson v. Towsley, and others supra, in which the United States was not a party, had been in error. According to the Ninth Circuit's reasoning, these suits were necessarily suits against the sovereign and, since prior to the QTA no relief was possible

against the sovereign, Block at 461 U.S. 282, relief was granted erroneously. The McIntyre decision cannot support so vast a conclusion.

This Court should grant certiorari to assert the authority of its existing decisions.

C. The United States Is Not a Trustee of These Lands.

The Court of Appeals' citation of Nichols v. Ryvasy, 809 F.2d 1317 (8th Cir. 1987) and other cases at 809 F.2d 1411 indicates a woeful misunderstanding that the United States holds this land in trust and is therefore an indispensable party. Eklutna/Cook Inlet's patents were issued under ANCSA. Unlike other statutes conferring on native Americans interests in public land, ANCSA §2(b) states that no trust is created. The legislative history

states that ANCSA patents are "in fee -- not in trust". House Report No. 92-523, 1972 U.S. Code Cong. & Ad. News, page 2199. See also Conference Report No. 92-746, at page 2253, and United States v. Atlantic Richfield, 435 F.Supp. 1009, 1018 (D.Alaska 1977), aff'd 612 F.2d 1132 (9th Cir. 1980), cert. den., 449 U.S. 888 (1980).

This Court should correct the misconception that ANCSA creates a trust relationship with the United States. Rights of United States' citizens under the homestead law should not be erased because of this misconception.

D. The Quiet Title Act Was Not Intended to Shield Patentees From Enforcement of Superior Title Under the Public Lands Statutes.

The bar of subsection (g) of 28 U.S.C. §2409a ("Any civil action under this section"; emphasis supplied)

extends no farther than the scope of subsection (a). The Ninth Circuit effectively strips QTA of the limiting words "real property in which the United States claims an interest".

This Court should restore to the QTA the meaning intended by congress. The QTA's statute of limitations has a specific, limited purpose to protect the public interest against too excessive a burden on public property and treasury, and to protect ongoing projects on federal land. Block at 461 U.S. 285, 290, Mottaz at 106 S.Ct. 2232. These policy considerations are absent when the United States has conveyed title.

Congress has affirmatively directed, moreover, that the United States should not be a party in any case after the land has been patented, regardless of whether the 12-year period of §2409a(g) has ex-

pired. The QTA reads:

(e) If the United States disclaims all interest in the real property . . . the jurisdiction of the district court shall cease unless it has jurisdiction . . . on ground other than and independent of the authority conferred by [28 U.S.C. §1346(f)]

§2409a(e) weighs heavily against the United States being an indispensable party in title actions after patent of the land. Congress believed that the United States should not be a defendant if no federal interest in the land was at stake. This is confirmed by §2409a(b) which gives the government the option to buy the land. §2409a(b) would be meaningless if the government has no interest in the land to lose. Likewise, §2409a(d) requires that a complaint state the interest claimed by the United States -- confirming that QTA has no application where, as here, the United States has

conveyed title to others.

The First Circuit has correctly ruled that

Application of the bar of the Quiet Title Act of 1972, indeed, does not give the United States a marketable title. A transferee under a deed from the United States would not enjoy the protection of that statute.

Economic Development & Industrial Corp. v. United States, 720 F.2d 1, 4 (1st Cir. 1983). See also United States v. Whited & Wheless, 246 U.S. 552 (1918) and United States v. Gammache, 713 F.2d 588 (10th Cir. 1983).

The Ninth Circuit attempted to distinguish Economic Development but gave no rationale for requiring a claimant to sue the United States after the government has parted with title. The Ninth Circuit's ruling would broadly bar, or invite courts to bar, any land title action against transferees from the govern-

ment, regardless of the strength of plaintiff's claim under a statutory land grant such as the homestead law, and regardless of whether the claim is barred by 28 U.S.C. §2409a(g).^{5/}

If this ruling stands no private litigation over federally-created land rights will be possible. Petitioners' case happens to involve patents to third party defendants under a statute which expressly preserves the post-patent remedies which the Ninth Circuit has now effectively abrogated. The patents issued to Eklutna/Cook Inlet are "subject to valid existing rights". CR-12, Exhibits D, E; CR-EK-9, Exhibits T, U; CR--CA-6, Exhibits, Q, R. This provision

5. To find that the QTA does not apply need not imply that no statute of limitations applies. AS 9.10.230 specifically governs constructive trust suits. It provides a 10-year period from issuance of patent. Block recognizes that federal courts should consult state law in such situations. 461 U.S. at 292 n. 28.

was required by ANCSA §14(g), 43 U.S.C. §1613(g).

All conveyances made pursuant to this chapter shall be subject to valid existing rights. . . .

This evidences a legislative intent that the right to enforce pre-existing rights survive the issuance of patents. It charges an ANCSA patent with a homesteader's title. Alaska v. Thorson, 91 I.D. 331, 335 (1984). However, enforcement of §14(g) necessarily becomes impossible as a result of the Ninth Circuit's decision.^{6/} This is because jurisdiction under the QTA necessarily ceases upon either of two events: (1) when the United

6. Entrymen such as Lee, Eklund and Carr were the intended beneficiaries of this provision. See 1971 Code Cong. & Ad. News 2250: "All valid existing rights, including inchoate rights of entrymen and mineral locators, are protected.". Uncontradicted floor statement in the House of Representatives shows that it was believed that ANCSA "protects all presently existing rights for all citizens, and where substantial untitled rights exist on lands selected by Natives, those rights will be protected". Congressman Begich, Dec. 14, 1971, 117 Cong. Rec. 46789.

States conveys title and disclaims interest in the land (§2409a(e)) or (2) lapse of 12 years from accrual of plaintiff's claim (§2409a(g)). (Please see Part III, however, re tolling of this 12-year period).

§14(g) rights only arise upon conveyance of land, but jurisdiction under the QTA (the only available jurisdiction, according to the Court of Appeals) ceases at the selfsame moment as the conveyance, 28 U.S.C. §2409a(e), because the United States is now declared to be an indispensable party. The Ninth Circuit thus requires persons claiming title to ANCSA-affected lands to invoke a non-existent jurisdiction -- implying that they have no remedy at all after issuance of patent. Congress could not have intended ANCSA §14(g) to such a vacuous result.

This gives the United States an arbitrary power in the United States to defeat rights in land by the mere act of patenting the land. This amounts to an unconstitutional taking of property. The Court of Appeals was oblivious to the resulting destruction of statutory rights. This Court should settle, that the United States is not a necessary party after the United States has conveyed its interest. Grant of certiorari at this time would clarify and prevent the confusion in land title litigation that is certain to ensue from application of the Ninth Circuit's new rule throughout the Ninth Circuit's broad geographical jurisdiction. It has extinguished Petitioners' claims and threatens to extinguish the claims of all others similarly situated.

II

PETITIONERS' CLAIMS UNDER ANCSA §22(b) ARE LIMITED ONLY BY 43 U.S.C. §1632(a).

ANCSA §22(b) directs the Secretary of the Interior anew to issue patents earned under 43 U.S.C. §164 without further delay.^{7/} The Court of Appeals failed to understand that determinations under ANCSA are subject to 43 U.S.C. §1632(a) rather than to 28 U.S.C. §2409a(g). §1632(a) requires that an ANCSA §22(b) court claim must be filed within two years of the later of October 2, 1980 or the Secretary's final ruling on the §22(b) claim. All Petitioners' §22(b) claims were timely filed within the §1632(a) period.

§1632(a) statute rather than 28 U.S.C. §2409a(g) is the applicable

7. This remedy is cumulative to petitioners' remedies under existing law and under ANCSA §14(g). Please see note 3 above.

statute of limitations with respect to Petitioners' ANCSA §22(b) claims because (1) the QTA is inapplicable because the United States claims no interest in the lands; and (2) a specific statute of limitations takes precedence over a broader statute which might otherwise apply. Sutherland, Stat. Const. §70.03 (4th Ed.)(Supp. 1987).

Since petitioners' claims were valid prior claimsd under the homestead laws, the intent of §22(b) is that they receive patent evidencing their titles. An action to enforce §22(b) against the Secretary of the Interior is not, however, an action relating to the government's claim of interest, as required in order for QTA to apply. §22(b) focusses on the Secretary's duty rather than the United States' claim to title. This duty arose for the first time in 1971 when

ANCSA was enacted, and continued until the Secretary finally made his decision, which here occurred in 1979. A patent issued under §22(b) would simply determine which of the private parties before the Court deserves the patent. 43 U.S.C. §1632(a), therefore, is the statute which Congress intended to apply to such determinations. The misapplication of 28 U.S.C. §2409a(g) to claims under ANCSA widely affects lands in Alaska. This Court should grant review to correct the Ninth Circuit's misconception.

III

**THE QUIET TITLE ACT'S STATUTE OF
LIMITATIONS SHOULD BE TOLLED
BY THE GOVERNMENT'S
MISREPRESENTATIONS OF THE
STATUS OF THE LANDS
CLAIMED BY PETITIONERS**

The Ninth Circuit has held that 28 U.S.C. §2409a(g) is not subject to equitable tolling. 809 F.2d 1410. It

further held that misrepresentations of law cannot toll a statute of limitations. This Court has held that 28 U.S.C. §2409a(g) should not be construed "unduly restrictively". Block at 461 U.S. 287; see also Bowen v. City of New York, 106 S.Ct. 2022 (1986). The federal tolling doctrine should be applied to §2409a(g) because that would be consistent with Congress's intent in enacting QTA. Cf. Bowen at 106 S.Ct. 2029. Congress presumably enacted QTA with awareness that the federal equitable tolling "doctrine is read into every federal statute of limitation". Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946).

The tolling doctrine extends to misrepresentations of law where the representations come from a source on which petitioners were entitled to rely. Glus v. Brooklyn Eastern District Terminal,

359 U.S. 232, 235 (1959). The Secretary of the Interior told petitioners in writing that they had no right to these lands. He further said they could "rest assured that no arbitrary action will be taken". Such representations to homesteaders in Alaska ought to have been deserving of their reliance.

The Secretary's representations cannot be reconciled with §24 FPA. §24 is written in especially clear and explicit language. The Secretary's assurances lulled petitioners into taking no further action and making no further inquiries. Petitioners had no reason to suspect that their loss was the result of a violation of statute.

The language cited by this Court in Bowen v. City of New York, 106 S.Ct. 2030, quoting 742 F.2d 738 is applicable here:

All of the class members who permitted their administrative or judicial remedy to expire were entitled to believe that their Government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States. Though they knew of the denial or loss of benefits, they did not and could not know that those adverse decisions had been made on the basis of a systematic procedural irregularity that rendered them subject to court challenge.

This reasoning contradicts the Ninth Circuit's opinion that petitioners have to suffer the consequences of the Secretary's misrepresentations about these lands. Petitioners could not be expected to know that there existed a statute, tucked away in Title 16, that gave them specific legal benefits.

Petitioners' ignorance of §24 was not mere passive ignorance. They made diligent inquiry. The misrepresentation came from a source from which they had a right to expect better.

The Court of Appeals' reliance on United States v. Kubrick, 444 U.S. 111 (1979) was misplaced. In Kubrick, the plaintiff failed to inquire into his rights.

Here, the cabinet-level officer made a representation that petitioners had no possible rights when the applicable statute not only permitted, but commanded, the very officer to whom claimants addressed their inquiry to allow them to enter these lands -- and to "declare" this fact to them! See §24 FPA. The "mistaken" advice which petitioners received was illegal and against public policy, and therefore blameworthy. The element of self-interest is evident. There exists, therefore, a "sound reason", see Kubrick at 444 U.S. 124 for making the United States (if the United States is in fact a defendant) bear the

consequences of the Cabinet member's statements.

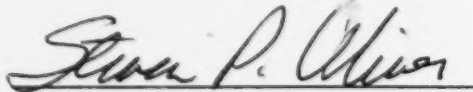
Conclusion

This Court should accept this case for review because the Ninth Circuit's deviation from sound law negatively affects future litigants with valid land claims under federal programs as well as petitioners. Specifically, the Court of Appeals has relegated Rule 19 to meaninglessness. Further, it has abused the QTA so as to cut back the available federal jurisdiction. These are major and fundamental errors. This Court should take this opportunity to stop present and future harm by granting review.

So clear are the errors of the Ninth Circuit that this Court may well dispose of this case by summary reversal of the Court of Appeals' decision to designate the United States as an indispensable

party. Petitioners respectfully recommend, however, that this Court accept this case for plenary review, since an opinion from this Court would be useful to the courts and the public by eliminating the confusion in public lands law which will result from the existence of the Ninth Circuit's published opinion.

Dated at Anchorage, Alaska on the 17th day of October, 1987.

A handwritten signature in cursive script, reading "Steven P. Oliver", written in dark ink on a light background.

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES W. LEE; RALPH A. EKLUND;
CORA CARR,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA;
SECRETARY OF THE INTERIOR;
DIRECTOR, BUREAU OF LAND
MANAGEMENT; EKLUTNA, INC.;
COOK INLET REGION, INC.,

Defendants-Appellees.

No. 86-3651

D.C. Nos.
CV-A79-336
CV-A80-301
CV-A82-411

ORDER AND
SECOND
AMENDED
OPINION

Argued and Submitted
January 6, 1987—Seattle, Washington

Filed February 9, 1987
Amended April 17, 1987

Before: Eugene A. Wright, Jerome Farris and
Robert R. Beezer, Circuit Judges.

Opinion by Judge Farris

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, District Judge, Presiding

SUMMARY

Jurisdiction

Appeal of a district court's dismissal of land claims against
the United States and two Alaska Native corporations.

Affirmed. Petition for rehearing denied and suggestion for rehearing en banc rejected.

In 1950 the federal Power Commission set aside certain lands in the Eagle River Valley, near Anchorage, Alaska, as a possible site for future power projects. In 1952 the Power Commission determined that the lands would not be injured by location or entry under the public land laws. Although the Secretary of Interior could have declared the lands open for homesteading, it did not. In 1957 appellants James Lee, Ralph Eklund and Cora Carr located on the lands, expecting to take title under the homestead laws. In 1959 appellants sent a letter to the Secretary asking why the Bureau of Land Management (BLM) had not restored the lands to the public domain after the Power Commission's determination. The Secretary answered that determinations regarding the lands would have to wait the completion of an engineering survey, and stressed that the lands were not open to entry. In 1961 the BLM recorded its survey and rejected the homestead applications of appellants insofar as the applications conflicted with the powersite classification. Appellants continued to argue with the BLM until 1964, when they received patents to all the lands they had claimed outside the powersite classification. The U.S. contends this constituted a compromise in which disputed issues of proof concerning the unclassified lands were resolved in their favor in exchange for their agreement to quit asserting claims to the classified lands, but there is no evidence in the record that the 1964 patents represented a compromise. In 1971 Congress passed the Alaska Native Claims Settlement Act. In 1979, pursuant to the Act, the formerly classified lands were patented to two Alaska Native corporations (Native corporations). Appellants filed an action against the United States and the Native corporations. The district court dismissed.

[1] The district court correctly ruled that its jurisdiction to consider the claims against the United States was limited to whatever jurisdiction was conferred by the Quiet Title Act,

28 U.S.C. Sec. 2409a. Congress intended the Quiet Title Act to provide the exclusive means by which adverse claimants could challenge the United States' title to real property. The court possessed no jurisdiction under the Quiet Title Act to hear the claims against the U.S., because the U.S. had disclaimed all interest in the disputed lands in 1979 when it patented the lands to the Native corporations. [3] Even if the United State's disclaimer of interest was ineffective, the claims against the U.S. would still be barred by the Quiet Title Act's 12-year statute of limitations, [4] which runs from the date the plaintiff or his predecessor knew or should have known of the claim of the U.S. to the disputed land. The district court correctly concluded that appellants should have realized by 1961 that the U.S. intended to reject their homestead claims. [5] The statute was not tolled by appellant's reliance on the Secretary's representations that he was under no duty to remove the powersite classification.

[6] The district court correctly stated the general rule that even though it lacked jurisdiction to consider the claims against the U.S. it did not necessarily lack jurisdiction to consider claims against the Native corporations, [7] but this case presents an exception to the general rule. All of the relief that appellants seeks required the presence of the United States as a party because in order to challenge the Native corporations' claim to the land they must establish the validity of their own claim. The United States is therefore an indispensable party to this action, [8] and the court's lack of jurisdiction over the U.S. claims requires the dismissal of the claims against the Native corporations.

COUNSEL

Steven P. Oliver, Anchorage, Alaska, for the plaintiffs-appellants.

David P. Wolf and Diane Smith, Anchorage, Alaska, and Edward J. Shawaker, Esq., Washington, D.C., for the defendants-appellees.

ORDER

The opinion filed February 9, 1987, and amended by order dated March 10, 1987, is further amended per the attached Amended Opinion.

With the changes reflected in the Amended Opinion, the panel has voted unanimously to deny appellants' petition for rehearing filed February 20, 1987 and amended March 20, 1987. Judges Farris and Beezer have voted to reject the suggestion for rehearing en banc and Judge Wright recommends rejection.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

FARRIS, Circuit Judge:

Lee, Eklund, and Carr assert a variety of claims against the United States and two Alaska Native corporations. All of their claims are based on the contention that in 1979 the Secretary of Interior conveyed lands that rightfully belonged to them to the Native corporations. On a motion for summary judgment, the district court dismissed their claims against the United States, and all but one of their claims against the

Native corporations, for lack of jurisdiction. It dismissed their remaining claim against the Native corporations for failure to state a claim. We affirm.

FACTS

In 1950, the Federal Power Commission, acting under the Federal Power Act, set aside certain lands in the Eagle River Valley, near Anchorage, Alaska, as a possible site for future power projects. In 1952, at the request of the Bureau of Land Management, the Power Commission determined that the lands would not be injured for purposes of power development by location or entry on the lands under the public land laws. Following that "no injury" determination, the Secretary of Interior could have declared the lands open for homesteading and other entry, but did not.

In 1957, Lee, Eklund, and Carr located on lands in the Eagle River Valley that included some of the lands classified under the Power Act, with the expectation of taking title under the homestead laws.¹ The Bureau of Land Management had told them that they could stake homestead claims in the Valley. The Power Commission, however, had advised them that the classified lands would be unavailable for homesteading until the Bureau of Land Management formally restored the lands to the public domain. At the time, the region had not been surveyed, and the boundaries of the classified lands were not precisely defined.

In 1959, Lee, Eklund, and Carr sent a letter to the Secretary inquiring as to why, even though the Power Commission had determined that the classified lands could be made available to homesteaders, the Bureau of Land Management had not restored the lands to the public domain. In his letter of response, the Secretary told them that specific determinations

¹The homestead laws were repealed in 1976 by Pub. L. 94-579, 90 Stat. 2789.

regarding the fate of the classified lands would have to await the completion of an engineering survey, and stressed that the classified lands were not open to entry. He also said that he did not intend to revoke the powersite classification, and that even if he did do so, selection rights to the classified lands might be given to other groups.

In 1961, the Bureau of Land Management recorded its survey of the region and issued final decisions rejecting the homestead applications of Lee, Eklund, and Carr insofar as the applications conflicted with the powersite classification. Lee, Eklund, and Carr continued to argue with the Bureau of Land Management concerning the extent of their homestead holdings until 1964, when they received patents to all of the lands that they had claimed outside of the powersite classification.

The United States contends that the patenting of the unclassified lands to Lee, Eklund, and Carr in 1964 constituted a compromise in which disputed issues of proof concerning the unclassified lands were resolved in their favor in exchange for their agreement to quit asserting claims to the classified lands. Accordingly, the United States urges that Lee, Eklund, and Carr should now be estopped from claiming title to the classified lands. Lee, Eklund, and Carr argue that there is no evidence in the record to indicate that their receipt of patents to the unclassified lands in 1964 represented a compromise.

In 1971, Congress passed the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1641 (1982). In 1979, pursuant to the Settlement Act, the formerly classified lands were patented to two Alaska Native corporations, Eklutna, Inc. and Cook Inlet Region, Inc. Lee, Eklund, and Carr subsequently filed the present actions against the United States and the Native corporations.

Lee, Eklund, and Carr argue that the disputed lands were effectively restored to the public domain as a result of the

Power Commission's "no injury" determination in 1952. Consequently, they contend that they began acquiring equitable title to the lands under the homestead laws when they entered on and began cultivating the lands in 1957. Alternatively, they argue that section 24 of the Power Act required the Secretary to declare the lands open to homestead entry following the Power Commission's "no injury" determination, and that therefore we should now recognize their claims to the lands under the homestead laws in order to put them in the position that they would have occupied if the Secretary had complied with the law.

Lee, Eklund, and Carr contend in particular that they should have received patents to the lands under section 22(b) of the Settlement Act, which provides that the Secretary shall "promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads . . ." 43 U.S.C. § 1621(b). They also argue that under section 14(g) of the Settlement Act, 43 U.S.C. § 1613(g), the conveyance of the lands to the two Native corporations in 1979 was subject to their pre-existing homestead rights. They seek a judicial declaration that Eklutna, Inc. and Cook Inlet Region, Inc. are constructive trustees holding the disputed lands in trust for their benefit.

DISCUSSION

We review *de novo* the district court's determinations concerning the extent of its subject matter jurisdiction. *Atkinson v. United States*, 804 F.2d 561, 562 (9th Cir. 1986). We may affirm on any ground fairly supported by the record. *City of Las Vegas v. Clark County*, 755 F.2d 697, 701 (9th Cir. 1985). We need not consider whether the agreements that Lee, Eklund, and Carr reached with the Bureau of Land Management in 1964 represented a compromise. Regardless of whether their claims should be estopped by the alleged compromise, other factors preclude the claims.

All of the claims are based on the theory that by entering upon and cultivating the disputed lands during the years following the Power Commission's "no injury" determination, Lee, Eklund, and Carr took sufficient steps as *de facto* homesteaders to vest themselves with equitable title to the lands under the homestead laws. Despite this common thread connecting all of the claims, however, we must analyze the claims against the United States separately from the claims against the Native corporations. This is because the Quiet Title Act, 28 U.S.C.A. 2409a (West. Supp. 1987), applies only to the former claims.

1) *Claims Against the United States*

The district court dismissed the claims against the United States for lack of jurisdiction. *Lee v. United States*, 629 F. Supp. 721 (D. Alaska 1985). The court ruled that the claims were actions against the United States "to secure patent[s] for the[] disputed homestead entries and to quiet title," and that consequently its jurisdiction to consider the claims derived solely from the Quiet Title Act. *Id.* at 726 (citing *Block v. North Dakota*, 461 U.S. 273 (1983)). It then held that it lacked jurisdiction to consider the claims because (1) the United States disclaimed its interest in the lands when it patented them to the Native corporations in 1979, thus divesting the court of jurisdiction under section 2409a(e) of the Act, and (2) even if the disclaimer was for some reason ineffective, the claims would still be barred by the Act's twelve-year statute of limitations. *Id.* at 726-27.

[1] The district court correctly ruled that its jurisdiction to consider the claims against the United States was limited to whatever jurisdiction, if any, was conferred upon it by the Quiet Title Act. The Supreme Court has held that "Congress intended the [Quiet Title Act] to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Block*, 461 U.S. at 286. All of the claims against the United States concern, either directly

or indirectly, the United States' title to the disputed lands. Accordingly, the district court's jurisdiction, if any, to hear the claims against the United States derived exclusively from the Quiet Title Act. See *McIntyre v. United States*, 789 F.2d 1408, 1410-11 (9th Cir. 1986). Lee, Eklund, and Carr argue that section 702 of the Administrative Procedure Act, 5 U.S.C. § 702 (1982), creates an independent jurisdictional basis for their administrative claims against the United States. We specifically rejected this argument in *McIntyre*. *Id.*²

[2] The district court possessed no jurisdiction under the Quiet Title Act to hear the claims against the United States. The United States disclaimed all interest in the disputed lands in 1979, when it patented the lands to Eklutna, Inc. and Cook Inlet Region, Inc. The district court found that the disclaimer was "valid and was made in good faith." *Lee*, 629 F. Supp. at 726. The Quiet Title Act expressly provides that "[i]f the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground[s] other than and independent of the authority conferred by [the jurisdictional provision of the Act]." 28 U.S.C.A. § 2409a(e) (West Supp. 1987). The only

²We do not hold, and do not read *McIntyre* to hold, that the Quiet Title Act constitutes the exclusive source of jurisdiction for *all* claims against the United States involving the United States' disposition of public lands. Section 2409a(e) of the Act provides that upon the United States' disclaimer of interest, jurisdiction in the district court will continue if the court "has jurisdiction . . . on ground[s] other than and independent of the authority conferred by [the jurisdictional provision of the Act]." 28 U.S.C. 2409a(e) (West Supp. 1987). The Administrative Procedure Act provides jurisdiction in cases of administrative wrongdoing. Here, the statute of limitations had run under both the Administrative Procedure Act and the Quiet Title Act before Lee, Eklund, and Carr commenced their actions. See 28 U.S.C. § 2401 (1982) and 28 U.S.C.A. § 2409a(g) (West Supp. 1987).

alternative basis for jurisdiction that Lee, Eklund, and Carr have asserted is section 702 of the Administrative Procedure Act, but they are precluded under *McIntyre* from asserting that basis of jurisdiction. *McIntyre*, 789 F.2d at 1410-11.

[3] Even if the United States' disclaimer of interest in the disputed lands was ineffective, the claims against the United States would still be barred by the Quiet Title Act's twelve-year statute of limitations. Section 2409a(g) of the Act states that "[a]ny civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it is accrued." 28 U.S.C.A. § 2409a(g) (West Supp. 1987). Congress intended for section 2409a(g) to apply retroactively. *See Block*, 461 U.S. at 286 n.23. *See also Grosz v. Andrus*, 556 F.2d 972, 975 (9th Cir. 1977).

[4] Section 2409a(g) specifically provides that an action "shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States" to the disputed land. 28 U.S.C.A. § 2409a(g) (West Supp. 1987). The claims against the United States accrued as soon as it became clear to Lee, Eklund, and Carr, or should have become clear to them, that the United States intended to reject their homestead claims to the classified lands. We agree with the district court that Lee, Eklund, and Carr "should have realized by 1961 that the United States had a conflicting claim to the portions of their homestead entries within the Power Site Classification[,] [because in] that year the [Bureau of Land Management] issued its survey covering the disputed lands, published notice of the survey in the Federal Register, and issued final decisions rejecting their homestead entries." *Lee*, 629 F. Supp. at 727. At the very latest, Lee, Eklund, and Carr should have known of the United States' conflicting claim to the disputed lands when they submitted their amended homestead applications in 1964. *See id.*

[5] Lee, Eklund, and Carr argue that the Quiet Title Act's twelve-year statute of limitations should be deemed to have been equitably tolled by their reliance on the Secretary's representations, arguably incorrect,³ that he was under no duty to remove the powersite classification. Statutes of limitation, however, are "triggered by [claimants'] knowledge of the transaction that constituted the alleged violation, not by their knowledge of the law." *Blanton v. Anzalone*, 760 F.2d 989, 992 (9th Cir. 1985). A claim accrues as soon as a potential claimant either is aware or should be aware of the existence of and source of his injury, not when he knows or should know that the injury constitutes a legal wrong. A different rule would require insufficient diligence on the part of potential claimants. See *United States v. Kubrick*, 444 U.S. 111, 123-24 (1979). Moreover, because the Quiet Title Act's statute of limitations "is a jurisdictional requirement, . . . '[t]he government may not be equitably barred from asserting [it].'" *McIntyre*, 789 F.2d at 1411 (quoting *Burns v. United States*, 764 F.2d 722, 724 (9th Cir. 1985)).

2) *Claims Against Eklutna, Inc. and Cook Inlet Region, Inc.*

The district court ruled that even though it lacked jurisdiction to consider the claims against the United States, it did not necessarily lack jurisdiction to consider the claims against the Native corporations. *Lee*, 629 F. Supp. at 727-28. The district court noted that "Congress passed the [Quiet Title Act] as a limited waiver of sovereign immunity for actions to acquire title from the federal government, . . . not to insulate private parties who acquire federal lands, such as Eklutna and Cook Inlet Region, from bona fide actions to challenge their title." *Id.* at 727.

³See *Reeves v. Andrus*, 465 F. Supp. 1065, 1070 (D. Alaska 1979) (section 24 of the Power Act requires the Secretary "to revoke or modify the power site classification within a reasonable period" following a "no injury" determination by the Power Commission).

[6] The district court correctly stated the general rule. Ordinarily, the fact that a claimant is barred from proceeding against the United States by the jurisdictional provisions of the Quiet Title Act does not prevent the claimant from asserting title to disputed lands against non-federal parties. See *Block*, 461 U.S. at 291. See also *Economic Development and Industrial Corp. v. United States*, 720 F.2d 1, 4 (1st Cir. 1983); *United States v. Gammache*, 713 F.2d 588, 592 (10th Cir. 1983).

[7] This case, however, is an exception to the general rule, because in this case the district court's lack of jurisdiction over the claims against the United States does require that the claims against the Native corporations also be dismissed. All of the relief that Lee, Eklund, and Carr seek requires the presence of the United States as a party. In order to challenge the validity of the Native corporations' patents to the disputed lands, Lee, Eklund, and Carr must be prepared to establish their own entitlement to the lands. "It is not sufficient for one challenging a patent to show that the patentee should not have received the patent; he must also show that he . . . is entitled to it." *Kale v. United States*, 489 F.2d 449, 454 (9th Cir. 1973), *cert. denied*, 417 U.S. 915 (1974). Lee, Eklund, and Carr can only properly establish their asserted entitlement to the disputed lands in direct proceedings against the United States. See *McIntyre v. United States*, 568 F. Supp. 1, 2-3 (D. Alaska 1983), *aff'd*, 789 F.2d 1408 (9th Cir. 1986). The United States is therefore an indispensable party to this action. See *Nichols v. Rysavy*, 809 F.2d 1317, 1331-34 (8th Cir. 1987) (United States held to be an indispensable party in a suit challenging the validity of fee patents issued to Native Americans); *Nichols v. Rysavy*, 610 F. Supp. 1245, 1253 (D. S.D. 1985) (United States held to be an indispensable party because "the United States . . . issued the fee patent in question, thus setting the entire series of events in motion that resulted in the action."). See also *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614, 615 (9th Cir. 1959) (United States held to be an indispensable party in a suit concerning

lands held in trust for Native Americans): *Cogo v. Central Council of Tlingit and Haida Indians*, 465 F. Supp. 1286, 1291 (D. Alaska 1979) (same). See generally Fed. R. Civ. P. 19(b). In so holding, we recognize that upon different facts the United States might not be an indispensable party.

[8] It follows from the fact that the United States is an indispensable party to this action that the district court's lack of jurisdiction as to the claims against the United States requires the dismissal of the claims against the Native corporations. See *Johnson v. Chilkat Indian Village*, 457 F. Supp. 384, 388 (D. Alaska 1978) (action dismissed because the court did not have jurisdiction over the Chilkat Village Council, and any judgment arrived at in a proceeding to which the Village Council was not a party would be inadequate). See also *Nichols*, 809 F.2d at 1331-34.

CONCLUSION

Lee's, Eklund's, and Carr's claims against the United States all concern title to real property. The district court's exclusive source of jurisdiction as to such claims is the Quiet Title Act. Under section 2409a(e) of the Quiet Title Act, the United States' disclaimer of interest in the disputed lands in 1979 had the effect of depriving the district court of jurisdiction over the claims. Even if the disclaimer was ineffective, the claims would still be barred by the Quiet Title Act's twelve-year statute of limitations. The United States is an indispensable party to the present actions, because Lee, Eklund, and Carr can only properly establish their entitlement to the lands in direct proceedings against the United States. It therefore follows, as a direct consequence of the district court's lack of jurisdiction over the claims against the United States, that the claims against the two Native corporations must also be dismissed.

We express no opinion regarding the district court's interpretation of sections 14(g) and 22(b) of the Settlement Act. 43

U.S.C. §§ 1613(g) and 1621(b). We also express no opinion as to the district court's ruling that the Settlement Act preempts the common law in the area of disputes brought by third parties against Native corporations concerning lands conveyed under the Settlement Act.

AFFIRMED.

James W. LEE, Plaintiff,

v.

UNITED STATES of America, Secretary
of the Interior, Director, Bureau of
Land Management, Eklutna, Inc., and
Cook Inlet Region, Inc., Defendants.

Ralph A. EKLUND, Plaintiff,

v.

UNITED STATES of America, Secretary
of the Interior, Director, Bureau of
Land Management, Eklutna, Inc., and
Cook Inlet Region, Inc., Defendants.

Cora CARR, Plaintiff,

v.

UNITED STATES of America, Secretary
of the Interior, Director, Bureau of
Land Management, Eklutna, Inc., and
Cook Inlet Region, Inc., Defendants.

Nos. A79-336 Civil. A80-201 Civil and
A82-411 Civil.

United States District Court,
D. Alaska.

Jan. 23, 1985.

Rehearing Denied and Decision
Amended Feb. 28, 1986.

AMENDED OPINION

FITZGERALD, Chief Judge.

James Lee, Ralph Eklund, and Warren
Carr staked out homestead claims during

the late 1950s in the Eagle River Valley within the Municipality of Anchorage. They and their families have had a running battle ever since with the Bureau of Land Management (BLM) and assorted other parties concerning their rights to those lands. Lee, Eklund, and Cora Carr (Warren's widow) brought these consolidated actions in 1979-1982 under a variety of statutory and common-law theories, seeking to gain title to the disputed lands or to recover money damages for inverse condemnation. I hereby dismiss their actions, with the exception of a single claim raised by Lee,¹ for lack of subject-matter jurisdiction and for failure to state a claim on which relief can be granted.

FACTUAL BACKGROUND

Lee, Eklund, and Carr staked out their disputed homestead claims in 1957, and filed notices of location with the BLM. In 1958-1959, BLM notified them by letter that significant portions of their homestead sites fell within federal Power Site Classification Number 399, established on March 29, 1950, and therefore were not available for private use or occupancy. The letters

1. Unlike Eklund and Carr, Lee has raised a claim against defendants Eklutna, Inc. and Cook Inlet Region, Inc. under section 14(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(c) (1982). Eklutna and Cook Inlet Region have moved for summary judgment on Lee's section 14(c) claim, but their motion was briefed separately and will be ruled upon by this court in a separate opinion.

indicated that each individual could petition the Federal Power Commission (FPC) to restore the lands he sought to public entry, but noted that such a restoration would not confer upon him any preference rights in the lands.

[1] When Lee, Eklund, and Carr petitioned the FPC for restoration of their lands, they were notified that the FPC had already made a determination under section 24 of the Federal Power Act, 16 U.S.C. § 818 (1982), that the value of those lands as a power site would suffer "no injury" if opened to selection, entry, or location under the public land laws. Once this "no-injury" determination was made, the Secretary of the Interior was required to modify the power classification and restore the lands to public entry within a reasonable time, unless he identified some other basis for withdrawing them. *See Reeves v. Andrus*, 465 F.Supp. 1065, 1070 (D.Alaska 1979).

No restoration order was ever issued by the Secretary or BLM. In 1959, BLM rejected the homestead entries of Lee, Eklund, and Carr on the ground that they directly conflicted with the Power Site withdrawal. All three men were notified of their rights to appeal the decisions rejecting their entries to the Director of BLM. There is no record that any of them ever filed a formal appeal.

On March 15, 1961, BLM promulgated a notice that it was filing a platted survey

covering the lands claimed by Lee, Eklund, and Carr. This notice was published in the Federal Register on March 23, 1961. See 26 Fed.Reg. 2486 (1961). The survey delineated the boundaries of Power Site Classification Number 399 in relation to the homestead sites selected by Lee, Eklund, and Carr, and was filed in the Anchorage BLM office on April 1, 1961. Soon after its publication, on April 27, 1961, the BLM issued final decisions rejecting the entries of Lee, Eklund, and Carr insofar as they conflicted with the Power Site withdrawal.²

Although the record indicates that the three men continued to object to these BLM decisions, and that Lee even retained legal counsel in 1963, they never won concessions from BLM concerning the lands within the Power Site Classification. All three men signed compromise agreements with BLM by 1964, which enabled them to submit their proof of occupancy and to receive patent to those portions of their entries outside the Power Site withdrawal. They all filed amended homestead entry applications excluding the contested lands, and Eklund was even permitted to apply for an additional forty-acre parcel, for

2. The BLM vacated these final decisions on May 15, 1961 for the sole purpose of allowing a more precise redrawing of the conformance lines for each individual's homestead entry. The May 15, 1961 decision specifically provided that it was "not to be construed as granting any additional rights or concessions to the withdrawn lands as described in the original order of withdrawals."

which he received patent in 1972, ostensibly in lieu of the excluded lands within his original claim.

The lands that Lee, Eklund, and Carr originally staked within Power Site Classification Number 399 remained under federal control until the 1970s. In 1974, the native village corporation of Eklutna, Inc. (Eklutna), organized pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1641 (1982), filed a land selection application under ANCSA section 12, 43 U.S.C. § 1611, that included these disputed lands. In 1979, the United States issued a patent for the surface estate of these lands to Eklutna, and a corresponding patent for the subsurface estate to Cook Inlet Region, Inc. (Cook Inlet Region) as the native regional corporation in Eklutna's region. *See* 43 U.S.C. § 1613(f).

Lee, Eklund, and Carr's widow each brought actions (which this court consolidated) against the United States, the Secretary, the BLM Director, Eklutna, and Cook Inlet Region, seeking to acquire patent to these lands. They claim that the Secretary and BLM violated federal law by failing to open the Power Site withdrawal to homesteading after the FPC issued its "no-injury" determination. They further claim that the federal defendants intentionally misled them concerning the status of the lands and the procedures to be followed when they originally settled the area and attempted to secure title. They also claim

that their rights to title have been preserved as against Eklutna and Cook Inlet Region through ANCSA sections 14(g), 43 U.S.C. § 1613(g), and 22(b), 43 U.S.C. § 1621(b), as well as through the application of several common-law theories.

Lee, Eklund, and Carr contend that this court should order the defendants to issue them patents to the disputed lands under its federal-question, mandamus, quiet-title, and equity jurisdiction, as well as under jurisdiction derived from the Administrative Procedure Act (APA). The plaintiffs and defendants have all moved for summary judgment.³

ANALYSIS

The threshold question in this action is whether this court has subject-matter jurisdiction over the plaintiffs' claims. In order to analyze this question properly, it is necessary to divide the plaintiffs' claims into three separate categories: 1) claims to acquire patent from the federal defendants; 2) claims to acquire patent from Eklutna and Cook Inlet Region; and 3) claims for

3. As noted in footnote 1, the only claim of the plaintiffs not addressed in this decision is Lee's claim under ANCSA section 14(c), 43 U.S.C. § 1613(c).

money damages against the United States.⁴ I conclude that the Quiet Title Act (QTA), 28 U.S.C. § 2409a (1982), bars this court from exercising jurisdiction over the plaintiffs' claims to acquire patent from the federal defendants. Moreover, I conclude that Congress' enactment of ANCSA preempts the plaintiffs' common-law claims against Eklutna and Cook Inlet Region, and conclude that ANCSA does not provide this court with subject-matter jurisdiction or authority to require Eklutna and Cook Inlet Region to issue patent to the plaintiffs. Finally, I conclude, based upon 28 U.S.C. §§ 1346(a)(2) and 1491 (1982), that this court lacks subject-matter jurisdiction over the plaintiffs' claims for money damages, although the United States Claims Court may have jurisdiction over those claims. Therefore, I dismiss the plaintiffs' actions.

1. *Claims to Acquire Patent From the Federal Defendants*

[2] Despite the variety of legal theories they espouse, all but one of the plaintiffs' claims against the federal defendants are directed at a single objective: to secure patent for their disputed homestead entries and to quiet title for those lands in them-

4. After these motions for summary judgment were fully briefed, the plaintiffs moved to amend their complaints and add claims for money damages against the United States on an inverse condemnation theory.

selves.⁵ The United States Supreme Court's decision in *Block v. North Dakota*, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983), requires that all parties bringing actions against the United States seeking to secure or quiet title to land must satisfy the requirements of the QTA. Parties cannot circumvent the QTA's jurisdictional and procedural limitations by "artfully pleading" such actions under other statutory provisions or legal theories, or as challenges to federal administrative action under the APA. *Id.* at 284-86 and n. 22, 103 S.Ct. at 1818-19 and n. 22; see *South Delta Water Agency v. United States Department of Interior*, 767 F.2d 531, 541-42 (9th Cir.1985); see also *Nevada v. United States*, 731 F.2d 633, 636 (9th Cir.1984); *McIntyre v. United States*, 568 F.Supp. 1, 2 (D.Alaska 1983). Therefore, all the plaintiffs' claims against the federal defendants that are intended to secure patent to their disputed homestead entries—regardless of whether the plaintiffs have classified them as administrative appeals, mandamus actions, or suits in equity—must pass muster under the QTA.

When analyzed under the terms of the QTA, the plaintiffs' claims to secure patent from the federal defendants suffer from two fatal weaknesses. First, the United

5. The sole exception is the plaintiffs' inverse condemnation claim against the United States, which seeks money damages.

States formally disclaimed all interest in the disputed lands following their conveyance to Eklutna and Cook Inlet Region. Section 2409a(d) of the QTA provides that:

If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title [the section providing jurisdiction over QTA actions].

28 U.S.C. § 2409a(d).

[3-5] Since the United States' conveyance of the disputed homestead property was required under the terms of ANCSA, there is no question that its disclaimer is valid and was made in good faith. Therefore, this court must confirm the United States' disclaimer of interest in the disputed lands. See *W.H. Pugh Coal Co. v. United States*, 418 F.Supp. 538, 539 (E.D. Wis.1976). Since no trial has yet commenced in this action, under the terms of section 2409a(d), this court's jurisdiction must cease over all the plaintiffs' claims to acquire patent from the federal defendants.⁶

6. The plaintiffs may attempt to argue that their administrative review and mandamus claims provide an alternative basis for this court to

[6] Second, even without a disclaimer by the United States, the plaintiffs' actions to acquire patent would be barred by the QTA's twelve-year statute of limitations, contained in section 2409a(f):

Any civil action under the QTA shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C. § 2409a(f). Since the QTA effects a limited waiver of the United States' sovereign immunity, its statute of limitations must be strictly construed and will not ordinarily be subject to equitable tolling. *California v. Yuba Goldfields, Inc.*, 752 F.2d 393, 396-97 (9th Cir.1985); *Nevada*, 731 F.2d at 634; see also *Block*, 461 U.S. at 287, 103 S.Ct. at 1819-20; *McIntyre*, 568 F.Supp. at 4.

[7,8] Under the terms of section 2409a(f), the QTA's twelve-year period of limitations began to run when Lee, Eklund,

retain subject-matter jurisdiction, as required under section 2409a(d), but this argument runs directly contrary to the Supreme Court's analysis in *Block*. In *Block*, the Supreme Court held that any action against the United States designed to quiet title must satisfy *all* the requirements of the QTA. 461 U.S. at 284-86, 103 S.Ct. at 1818-19. This presumably includes the no-disclaimer requirement imposed by section 2409a(d).

and Carr "knew or should have known of the claim of the United States" to the disputed lands. 28 U.S.C. § 2409a(f); *Guam v. United States*, 744 F.2d 699, 700 (9th Cir.1984). In determining this date, this court must employ a test of reasonableness. *Yuba Goldfields*, 752 F.2d at 396; *McIntyre*, 568 F.Supp. at 3. The statutory period began to run when the three men reasonably should have known that the United States had a conflicting claim to the lands they sought, regardless of how strong they believed that claim to be. See *Guam*, 744 F.2d at 701; *Nevada*, 731 F.2d at 635. "The existence of [even] one uncontroverted instance of notice [to each of the men], sufficed to trigger the limitations period." *Id.*; see also *Yuba Goldfields*, 752 F.2d at 396-97; *Guam*, 744 F.2d at 701.

[9.10] Under this standard, Lee, Eklund, and Carr clearly should have realized by 1961 that the United States had a conflicting claim to the portions of their homestead entries within the Power Site Classification: that year the BLM issued its survey covering the disputed lands, published notice of the survey in the Federal Register, and issued final decisions rejecting their homestead entries. See *Yuba Goldfields*, 752 F.2d at 396-97; *Guam*, 744 F.2d at 701; *McIntyre*, 568 F.Supp. at 4. Moreover, by 1964, when the three men all reached signed compromise agreements with BLM and filed amended homestead

entry applications in accordance with BLM's dictates, they indisputably knew of the United States' claim that the withdrawn land was not subject to entry under the public land laws. Even assuming that the three men first learned of the government's position in 1964, their quiet title causes of action against the federal defendants all accrued well over twelve years before 1979, 1980, and 1982, when they and their successors filed the present actions. Therefore, the plaintiffs' claims to acquire patent from the federal defendants are all barred under the QTA's statute of limitations.

Based either upon the government's disclaimer or the QTA's statute of limitations, I must dismiss the plaintiffs' claims to acquire patent from the federal defendants for lack of subject-matter jurisdiction.

2. *Claims to Acquire Patent From Eklutna and Cook Inlet Region*

[11.12] The plaintiffs have also brought claims against Eklutna and Cook Inlet Region, seeking title to the disputed lands under various common-law theories, including a constructive-trust theory, and under ANCSA sections 14(g), 43 U.S.C. § 1613(g), and 22(b), 43 U.S.C. § 1621(b). The QTA's twelve-year statute of limitations does not bar these claims, since under its plain terms, the QTA applies only to claims brought "to quiet title *against the United States*." 28 U.S.C. § 2409a (em-

phasis added). Congress passed the QTA as a limited waiver of sovereign immunity for actions to acquire title from the federal government, *see Block*, 461 U.S. at 287, 103 S.Ct. at 1819-20, not to insulate private parties who acquire federal lands, such as Eklutna and Cook Inlet Region, from bona fide actions to challenge their title. *See generally Economic Development and Industrial Corp.*, 720 F.2d 1, 4 (1st Cir.1983).

Nor does the QTA operate like an adverse possession statute and automatically provide Eklutna and Cook Inlet Region with valid title to the disputed lands as against the plaintiffs. The Supreme Court expressly indicated in *Block* that the QTA is merely jurisdictional and does not transfer title in disputed lands even to the United States:

Unlike an adverse possession provision, § 2409a(f) does not purpose to effectuate a transfer of title. If a claimant has title to a disputed tract of land, he retains title even if his suit to quiet his title is deemed time-barred under § 2409a(f). A dismissal pursuant to § 2409a(f) does not quiet title to the property in the United States. The title dispute remains unresolved. Nothing prevents the claimant from continuing to assert his title....

Block, 461 U.S. at 291-92, 103 S.Ct. at 1822; *accord Economic Development and Industrial Corp.*, 720 F.2d at 4. Thus, the QTA did not divest the plaintiffs of whatever color of title they may have once pos-

sessed in the disputed lands. Since the QTA does not protect Eklutna and Cook Inlet Region from suit, the plaintiffs are free to assert their claims of ownership against those corporations insofar as other statutes and common-law principles permit.

[13] The plaintiffs have raised several common-law claims against Eklutna and Cook Inlet Region, including a claim that the disputed lands were wrongfully withheld from them by the federal government, were wrongfully transferred to Eklutna and Cook Inlet Region under ANCSA, and thus are currently being held for them in a constructive trust by those corporations. To determine the extent to which common-law causes of action and remedies are available to individuals like the plaintiffs, who claim title to lands contained in ANCSA conveyances, it is necessary to examine the extent to which Congress "spoke directly" concerning such claims in ANCSA itself. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-19, 101 S.Ct. 1784, 1790-94, 68 L.Ed.2d 114 (1981); see also *Texas v. Pankey*, 441 F.2d 236, 241 (10th Cir.1971) (federal common law applies "[u]ntil the field has been made the subject of comprehensive legislation or authorized administrative standards"). "[W]hen Congress addresses a question previously governed by a decision rested on federal common law, the need for [application of common law] by federal courts disappears," *City of Milwaukee*, 451 U.S. at 314, 101 S.Ct. at 1791;

moreover, "[t]he establishment of ... a self-consciously comprehensive program by Congress [for regulating a particular area] strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *Id.* at 319, 101 S.Ct. at 1793.

ANCSA's language, structure, and legislative history indicate that Congress intended it to provide a comprehensive and final resolution of all issues relating to native land claims in Alaska. In enacting ANCSA, Congress declared that "the settlement [of those issues] should be accomplished *rapidly, with certainty, ... [and] without litigation.*" 43 U.S.C. § 1601(b) (emphasis added). Congress viewed ANCSA as constituting a complete and detailed "*settlement package*," in which Alaska natives agreed to the extinguishment of all their claims based upon aboriginal title in exchange for fee title to more than 40 million acres and a cash settlement of about one billion dollars. H.Conf.Rep. No. 746, 92nd Cong. 1st Sess. 1, 34 (1971), U.S.Code Cong. & Admin.News 1971, p. 2192 (emphasis original); see also *United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1134 (9th Cir.), *cert. denied*, 449 U.S. 888, 101 S.Ct. 244, 66 L.Ed.2d 113 (1980). In light of Congress' desire to provide a complete, final, and certain resolution of native land claims in ANCSA and to minimize the need for litigation, it seems unlikely that Congress would have authorized large-scale

conveyances of lands to native corporations without carefully delineating the rights of other parties to assert claims to those lands. Allowing private parties to claim ownership to ANCSA-conveyance lands under a host of common-law theories would enable them to undermine the ANCSA settlement and to prevent native corporations from fully enjoying the fruits of the settlement for many years.

Moreover, Congress "spoke directly" in ANCSA concerning individuals' rights to assert claims to ANCSA-conveyance lands based on prior use and occupancy. At least four separate, detailed ANCSA provisions address and define these rights. *See* 43 U.S.C. §§ 1613(c)(1) (primary place of residence and business); 1613(g) (leases, contracts, rights-of-way, and easements); 1621(b) (homesteads, headquarters sites, trade and manufacturing sites, and small tract sites); 1621(c) (mining claims and locations). According to ANCSA's legislative history, Congress believed that "[a]ll valid existing rights [to ANCSA-conveyance lands], including inchoate rights of entrymen and mineral locators, are protected" under ANCSA's provisions. H.Conf. Rep. No. 746, at 37, U.S.Code Cong. & Admin.News 1971, at p. 2229. Congress plainly did not believe that common-law remedies would be necessary to supplement ANCSA in order to protect individuals' rights to ANCSA lands, or that parties should be permitted to assert claims to

ANCSA-conveyance lands that were not expressly recognized in ANCSA.

[14] Based on the detail with which ANCSA was drafted and Congress' intention to provide a certain and all-encompassing resolution of Alaska native land claims, I agree with the assessment of the United States Court of Claims in *Cape Fox Corp. v. United States*, 4 Cl.Ct. 223 (1983):

The ANCSA is comprehensive. It sets out with particularity the rights of the United States, the natives, the State, and third parties, with respect to the lands and revenues to be distributed, and established a time frame in which these rights and duties are to attach.

[15] Since Congress "spoke directly" in ANCSA concerning individuals' rights to assert claims to ANCSA-conveyance lands and established "a self-consciously comprehensive program" in ANCSA for determining such rights, I conclude, based upon *City of Milwaukee*, that Congress intended ANCSA to "occupy the field" in this area and to preempt any common-law theories or other statutory claims that individuals might assert. See *City of Milwaukee*, 451 U.S. at 314, 319, 101 S.Ct. at 1793-94. Given the extensive set of provisions in ANCSA delineating the rights of individual claimants to ANCSA-conveyance lands, any attempt to supplement these provisions with common-law remedies, such as the constructive-trust theory advanced by the plaintiffs, would represent an attempt to

alter the comprehensive legislative scheme adopted by Congress in ANCSA, rather than to "*fill a gap*" that Congress has not occupied, and would therefore be an impermissible application of federal common law. *See id.* at 324 & n. 18, 101 S.Ct. at 1796 & n. 18. Thus, I dismiss the plaintiffs' common-law claims against Eklutna and Cook Inlet Region, and hold that the plaintiffs' claims seeking to recover title to the disputed lands from these corporations must be expressly based upon provisions contained in ANCSA.

The plaintiffs have brought claims against Eklutna and Cook Inlet Region under ANCSA sections 14(g), 43 U.S.C. § 1613(g), and 22(b), 43 U.S.C. § 1621(b). They claim that these ANCSA provisions preserve their rights to receive title to their disputed homestead entries as against the defendant native corporations. ANCSA section 22(b) provides that:

The Secretary is directed to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws *for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites* ... and who have fulfilled all requirements of the law prerequisite to obtaining a patent. Any person who has made a lawful entry prior to August 31, 1971, for any of the foregoing purposes shall be protected in his right of use and

occupancy until all the requirements of law for a patent have been met.... *Provided*, that occupancy must have been maintained in accordance with the appropriate public land law....

43 U.S.C. § 1621(b) (emphasis added).

ANCSA section 14(g) provides that:

All conveyances made [to native corporations], pursuant to [ANCSA] shall be subject to valid existing rights. Where prior to patent of any land or minerals under [ANCSA], a *lease, contract, permit, right-of-way, or easement* (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

43 U.S.C. § 1613(g) (emphasis added).

[16] Based upon my analysis and comparison of the wording of these two provisions, I conclude that ANCSA section 22(b), and not section 14(g), was intended by Congress to protect the interests of individuals, like the plaintiffs, who claim ANCSA-conveyance lands based upon their prior entry and occupancy of those lands "for the purpose of gaining title to homesteads." The

plain language of section 22(b) refers to "homesteads," "the public land laws," and "lawful entry"; in contrast, section 14(g) refers only to "lease[s], contract[s], permit[s], right[s]-of-way, [and] easement[s]." The two provisions thus address completely distinct sets of property interests and contractual rights established by the federal government: section 22(b) addresses those interests arising out of the operation of the public land law and four statutory programs in particular, whereas section 14(g) addresses those property interests and contractual rights that the federal government creates on a case-by-case basis through the "issu[ance]" of written authorizations and agreements.⁷ There is no reason to believe that Congress intended section 14(g) to overlap with section 22(b) and to apply also to interests arising out of homestead entries,

7. At first glance, another distinction between section 22(b) and section 14(g) may appear to be that section 22(b) covers interests leading to acquisition of title, whereas section 14(g) does not. However, this distinction runs contrary to the Secretary's interpretation of the two provisions, which is that they both encompass at least some property interests that may eventually mature or develop into full-scale title. *See, e.g.,*

Secretarial Order No. 3016 and accompanying Memorandum, Valid Existing Rights Under the Alaska Native Claims Settlement Act, 85 Interior Dec. 1, 5-8 (1977). The correctness of the Secretary's interpretation is unnecessary to resolve for purposes of the present case, and I only conclude now that Congress did not intend to include homestead entries as property interests protected by section 14(g).

when section 14(g) does not mention the term "homestead," as section 22(b) does, and when section 14(g) appears to have been designed to cover a totally different set of property interests.

[17] Moreover, a step-by-step analysis of the ANCSA conveyance process, including the Secretary's regulations for administering ANCSA conveyances, confirms that section 14(g) cannot be interpreted to overlap with section 22(b) and to apply to homestead entries. Under section 22(b), "[t]he Secretary is directed to *promptly* issue patents to all persons who have made a lawful entry on the public lands in compliance with the [homestead] laws ... and who have fulfilled all requirements of the law prerequisite to obtaining a patent"; he is also directed to "protect in [their] right of use and occupancy" all "person[s] who ha[ve] made a lawful entry prior to August 31, 1971" but who have not yet fulfilled all the homestead requirements. 43 U.S.C. § 1621(b) (emphasis added). Unlike other ANCSA provisions concerning individuals' prior existing claims to lands selected under ANCSA, including section 14(g), section 22(b) does not indicate that the lands to which it refers will ever be conveyed. *See, e.g.*, 43 U.S.C. § 1613(c)(1) (primary places of residence and business); 43 U.S.C. § 1613(g) (leases, contracts, permits, rights-of-way, and easements); 43 U.S.C. § 1621(c) (mining claims and locations). This omission, combined with Congress'

use of the word "promptly," suggests that Congress intended section 22(b), unlike many parallel ANCSA provisions, to operate *prior to*, rather than following, any ANCSA conveyance: it requires the Secretary to assess the validity of potential claims that might be raised under the homestead laws *before* conveying lands involving such claims to native corporations.

This interpretation of section 22(b) as a *pre-conveyance* provision is supported by the Secretary's regulations, which provide that the Secretary will not transfer to a native corporation any lands for which he determines that valid homestead entries have been made:

Pursuant to sections 14(g) and 22(b) of the act, *all conveyances issued under the act shall exclude any lawful entries which have perfected under, or are being maintained in compliance with, laws leading to the acquisition of title*, but shall include lands subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under section 6(g) of the Alaska Statehood Act), contracts, permits, rights-of-way, or easements.

43 CFR § 2650.3-1(a) (emphasis added). Since the Secretary is required under section 22(b) to assess the validity of all potential homestead claims, and is also required under his own regulations to exclude from any ANCSA conveyances those homestead claims determined to be valid, it is clear

that he must make the homestead evaluations required under section 22(b) *prior* to making any ANCSA conveyances.

In contrast to section 22(b), section 14(g) is by its very terms a *post-conveyance* provision: it imposes obligations upon native corporations that take effect only once they receive conveyances of lands that are subject to "valid existing rights." See 43 U.S.C. § 1613(g). Since under section 22(b) and 43 CFR § 2650.3-1(a), the validity of all homestead-related claims is supposed to be resolved by the Secretary prior to any ANCSA conveyance, and since in theory, no conveyance is supposed to include valid homestead entries, Congress could not have intended section 14(g) to apply to homestead-related claims. Under the ANCSA conveyance process, any "valid" homestead claim will be segregated by the Secretary before it can be conveyed, and will never reach the native corporations. Conversely, any purported homestead claim contained in an ANCSA conveyance will presumably already have been determined invalid by the Secretary. Thus, it would be anomalous for a native corporation to conclude that a homestead claim within a conveyance it receives is a "valid existing right" entitled to protection under section 14(g). As a result, section 14(g) cannot apply to claims based on the homestead laws.

Congress appears to have had several strong reasons for choosing to address claims under the homestead laws in a sepa-

EDITOR'S NOTE

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rate provision from claims involving the property and contractual interests enumerated in section 14(g), and for choosing to require the *Secretary* to assess the validity of all homestead claims *prior to conveyance*, rather than requiring *native corporations* to perform this function *following conveyance*, as it did with the section 14(g) property interests. First, the Secretary is better equipped than the individual native corporations to assess the validity of homestead claims, because of his expertise concerning the intricacies of public land law, his access to records concerning various claims, and his prior dealings with various entrymen. It would create an unnecessary burden on native corporations' time and resources to require them to accumulate this same information and expertise.

Second, if lands subject to homestead claims were included in ANCSA conveyances to native corporations, those lands would presumably be counted as part of the corporations' total ANCSA lands entitlement. Since the corporations would then have to relinquish all valid homestead entries without receiving any compensating benefit, they would effectively be deprived of part of the total benefits to which ANCSA entitled them. In contrast, the property and contractual interests which section 14(g) requires the native corporations to administer are all revenue-generating: when the lands subject to section 14(g) leases, per-

mits, options to purchase,⁸ or other interests are turned over to native corporations, the corporations will ultimately either retain control of these lands or at least receive some rent or income in return. *See generally* Secretarial Order No. 3016 and accompanying memorandum, Valid Existing Rights Under the Alaska Native Claims Settlement Act, 85 Interior Dec. 1, 8. Thus, treating homestead claims differently from section 14(g) claims and requiring the Secretary to exclude any valid homestead claims from ANCSA conveyances can be viewed as an attempt by Congress to ensure that native corporations receive their full lands entitlements under ANCSA. Furthermore, requiring the Secretary, as opposed to the native corporations, to make the final determinations concerning the validity of all homestead claims is especially appropriate, given the direct economic stake that native corporations would have in rejecting homestead claims so that they would be entitled to retain the lands being

8. The Secretary has concluded that certain options to purchase constitute "valid existing rights" under section 14(g). Secretarial Order No. 3016 and accompanying Memorandum, Valid Existing Rights Under the Alaska Native Claims Settlement Act, 85 Interior Dec. 1, 7-8 (1977). I merely cite options to purchase as an example of a *possible* section 14(g) property interest in this context, and do not mean to imply any decision at this point as to whether such options are covered under the terms of section 14(g).

claimed.⁹

[18] Based on this analysis, I dismiss the plaintiffs' claims against Eklutna and Cook Inlet Region under ANCSA sections 14(g) and 22(b). The claims by Lee, Eklund, and Carr to the disputed lands are all exclusively premised upon compliance with the homestead laws: all three individuals claim to have originally entered and occupied the contested lands "for the purpose of gaining title to homesteads." *See* 43 U.S.C. § 1621(b). None of the three plaintiffs' claims are based upon any of the property interests enumerated in section 14(g). As a result, the plaintiffs have failed to state a claim for which relief can be granted under section 14(g), and I must dismiss their section 14(g) claims. *See* Fed. R.Civ.P. 12(b)(6).

[19] I dismiss the plaintiffs' section 22(b) claims against Eklutna and Cook Inlet Region for lack of subject-matter jurisdiction. By its plain terms, section 22(b) establishes a duty only on the part of the Secretary to issue patents to individuals with valid homestead claims. It does not establish any duty on the part of native corporations to individuals claiming lands

9. It should be noted, however, that Congress did not structure all of ANCSA's provisions in order to avoid having native corporations determine the validity of claims to lands that they might consider economically valuable. *See, e.g.*, 43 U.S.C. § 1613(c)(1).

based on the homestead laws: as indicated above, Congress did not intend for native corporations to be involved in evaluating the validity of such claims, or to convey any of the lands they receive under ANCSA to those raising such claims. *See* 43 U.S.C. § 1621(b). As a result, the plaintiffs cannot bring any claims against the defendant native corporations under section 22(b).¹⁰

[20] The only defendant that the plaintiffs could conceivably sue based upon section 22(b) is the Secretary. *See id.* However, section 22(b) does not itself contain a waiver of the federal government's sovereign immunity, or provide any mechanism for parties, like the plaintiffs, to obtain administrative or judicial review of the Secretary's determinations under that provision. Therefore, any action that the plaintiffs bring against the Secretary based upon section 22(b) that is designed to acquire patent to the contested lands would have to be brought under the QTA. *See Block*, 461 U.S. at 286 and n. 22, 103 S.Ct.

10. Although I dismiss the plaintiffs' common-law and section 22(b) claims against Eklutna and Cook Inlet Region for lack of subject-matter jurisdiction, Eklutna has requested that I nevertheless make complete findings of fact on these claims in case the Court of Appeals disagrees with my jurisdictional analysis. Such findings would be purely advisory in light of my conclusions concerning this court's jurisdiction, and I therefore decline to make such findings.

at 1819 n. 22 (holding that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property," and that parties claiming title to lands held by the federal government cannot bring actions under the APA). Since the plaintiffs' claims to acquire title to the disputed lands from the government were already barred under the QTA's twelve-year statute of limitations before the Secretary made his section 22(b) determination, *see* section 1, *supra*, I conclude that any claims by them seeking title based on his section 22(b) determination are also time-barred.¹¹

11. I conclude that section 22(b) does not extend the period of limitations for individuals like the plaintiffs, whose time for initiating actions has already elapsed under the QTA. Section 22(b) does not expand the rights of the plaintiffs in the disputed lands beyond those they had in 1961-1964, when their QTA causes of action accrued. *See* section 1, *supra*. Therefore, the plaintiffs cannot contend that the QTA's twelve-year period started over again when the Secretary made his section 22(b) determination in the late 1970s. *See Yuba Goldfields*, 752 F.2d at 396-97 (QTA's twelve-year period begins to run when parties *first* become aware that the United States may assert a claim to lands they are claiming); *Guam*, 744 F.2d at 700-01 (same); *Nevada*, 731 F.2d at 635 (same).

The plaintiffs may contend that their actions raise timely section 22(b) claims based on ANCSA's limitations provision for challenges to decisions made by the Secretary, 43 U.S.C. § 1632(a) (1992). Section 1632(a) provides that: "a decision of the Secretary under ... the Alaska Na-

tive Claims Settlement Act shall not be subject to judicial review unless such action is initiated before a court of competent jurisdiction within two years after the day the Secretary's decision becomes final or December 2, 1980, whichever is later: *Provided*, that the party seeking such review shall first exhaust any administrative appeal rights." *Id.*

The negative phrasing of section 1632(a) ("shall not be subject to judicial review *unless* ") and its reference to "court[s] of *competent jurisdiction*:" indicate that it was not intended by Congress to *create* jurisdiction over parties' claims based on ANCSA or to *expand* the remedies available to parties beyond those already available under other provisions. Moreover, section 1632(a)'s legislative history confirms that it was adopted to *limit*, rather than extend, the time for judicial review: Congress noted that "[d]ue to the interwoven nature of entitlements, decisions, and conveyances concerning land under ... ANCSA, it is desirous that administrative decisions be absolutely final in minimum periods of time." S.Rep. No. 413, 96th Cong., 2d Sess. 291 (1980), *reprinted in* 1980 U.S.Code Cong.Ad.News 5070, 5235. Congress did not envision the provision as authorizing judicial review in cases where it was not already available, but instead stated that "[t]his section provides that judicial review be instituted, *if at all*, within two years of the date a Secretarial decision becomes effective." *Id.* at 291-93, *reprinted in* 1980 U.S.Code Cong. and Ad.News at 5235-36 (emphasis added). Thus, because at the time of the Secretary's section 22(b) decision, the QTA barred any challenge to that decision, section 1632(a) does not create an independent basis for jurisdiction over such a challenge.

I note in passing also that section 1632(a) requires that parties "exhaust any administrative appeal rights" before seeking judicial review of Secretarial decisions under ANCSA. 43 U.S.C. § 1632(a). The record indicates that of

3. *Inverse Condemnation Claims Against the United States*

[21] Lee, Eklund, and Carr have also brought inverse condemnation claims against the United States, alleging a "taking" of their property without just compensation. They contend that prior to the Secretary's conveyance of the contested lands to Eklutna and Cook Inlet Region, they had property rights in those lands that remained intact despite the bar of the QTA. *See generally Block*, 461 U.S. at 291-92, 103 S.Ct. at 1822. According to the plaintiffs, by conveying those lands under ANCSA to the defendant native corporations, who cannot be sued for title under ANCSA's provisions, the Secretary effectively extinguished their property rights. It is these property rights for which the plaintiffs have brought inverse condemnation claims. *See generally Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 2328-32, 81 L.Ed.2d 186 (1984) (holding that eminent domain power may be used to implement land redistribution program).

Each plaintiff is seeking "in excess of \$10,000" in money damages on their inverse condemnation claims. The United States Claims Court has exclusive jurisdiction over the three plaintiffs, only Lee can arguably be deemed to have exhausted his administrative appeal rights regarding his section 22(b) claims.

tion over actions for money damages against the United States when the amount sought is greater than \$10,000. 28 U.S.C. §§ 1491, 1346(a)(2) (1982); *Cape Fox Corp. v. United States*, 646 F.2d 399, 401-02 (9th Cir.1981). Therefore, I must dismiss the plaintiffs' inverse condemnation claims for lack of subject-matter jurisdiction.¹²

WHEREFORE, IT IS ORDERED THAT:

1) the plaintiffs' claims for patent against the federal defendants are dismissed for lack of subject-matter jurisdiction;

2) the plaintiffs' common-law claims for patent against defendants Eklutna and Cook Inlet Region are dismissed for lack of subject-matter jurisdiction;

3) the plaintiffs' claims for patent against defendants Eklutna and Cook Inlet

12. Despite the fact that this court lacks subject-matter jurisdiction over the plaintiffs' inverse condemnation claims, the federal defendants have requested me to make findings of fact that could be used by the Claims Court in any subsequent action there. However, such findings would be purely advisory and would undermine the exclusive jurisdiction of the Claims Court over the plaintiffs' inverse condemnation claims. See *Cape Fox Corp. v. United States*, 646 F.2d 399, 402 (9th Cir.1981). Therefore, I decline to make such findings.

Region under ANCSA section 14(g) are dismissed for failure to state a claim upon which relief can be granted, and their claims under ANCSA section 22(b) are dismissed for lack of subject-matter jurisdiction; and

4) the plaintiffs' inverse condemnation claims against the United States are dismissed for lack of subject-matter jurisdiction.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES W. LEE; RALPH A. EKLUND;)	
CORA CARR,)	
)	
Plaintiffs-Appellants,)	No. 86-
)	
vs)	3651
)	
UNITED STATES OF AMERICA;)	
SECRETARY OF THE INTERIOR;)	
DIRECTOR, BUREAU OF LAND)	
MANAGEMENT; EKLUNTNA, INC.;)	
COOK INLET REGION, INC.,)	
)	
Defendants-Appellees.)	
)	

CV-A80-301 CV-A79-336 CV-A82-441

APPEAL from the United States
District Court for the ANCHORAGE District
of ALASKA

THIS CAUSE came on to be heard on
the Transcript of the Record from the
United States District Court for the
ANCHORAGE District of ALASKA and was duly
submitted.

ON CONSIDERATION WHEREOF, It is now

here ordered and adjudged by this Court,
that the judgment of said District Court
in this Cause be, and hereby is AFFIRMED.

Filed and entered 03-10-87

FILED
JUL 22 1987
CATHY A CATTERSON CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES W. LEE; RALPH A.)	
EKLUND; CORA CARR,)	CA No. 86-
)	3651
Plaintiffs-)	
Appellants,)	DC No. CV-
)	A80-301
v.)	(District of
)	Alaska)
UNITED STATES OF AMERICA;)	
SECRETARY OF THE IN-)	
TERIOR, DIRECTOR, BUREAU)	ORDER
OF LAND MANAGEMENT;)	
EKLUTNA, INC.; COOK INLET)	
REGION, INC.)	
)	
Defendants-)	
Appellees.)	

Before: WRIGHT, FARRIS, and BEEZER,
Circuit Judges.

The panel as constituted in the
above case has voted to deny the petition
for rehearing filed April 24, 1987.
Judges Farris and Beezer have voted to
reject the suggestion for a rehearing

en banc and Judge Wright recommends rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Any lands of the United States included in any proposed projection under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this subchapter, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this subchapter, upon payment of any damages to crops, buildings, or other improvements caused thereby to

the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the Commission: *Provided*, That locations, entries, selections, or filings heretofore made for lands reserved as water-power sites, or in connection with water-power development, or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained: *Provided further*, That before any lands applied for, or heretofore or hereafter reserved, or classified as power sites, are declared open to location, entry, or selection by the Secretary of the Interior, notice of intention to make such declaration shall be given to the Governor of the State within which such lands are located, and such State shall have ninety days from the date of such notice within which to file, under any statute or regulation applicable thereto, an application for the reservation to the State, or any political subdivision thereof, of any lands required as a right-of-way for a public highway or as a source of materials for the construction and maintenance of such highways, and a copy of such application shall be filed with the Federal Power Commission; and any location, entry, or selection of such lands, or subsequent patent thereof, shall be subject to any rights granted the State pursuant to such application.

Quiet Title Act of 1972, as amended; 28
U.S.C. §2409a.

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425 and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action

under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property,

the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is

commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

[Subsections (h) through (m) pertain to actions brought by a state, and are therefore omitted as not being pertinent to the issues of this petition.]

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

43 U.S.C. §161.

Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one-quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

43 U.S.C. §164.

No certificate shall be given or patent issued therefor until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead his widow, or in case of her death his heirs or devisee, or in case of a widow making such entry her heirs or devisee, in case of her death, proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit and makes affidavit that no part of such land has been alienated, except as provided in section 174 of this title, and that

he, she, or they will bear true allegiance to the Government of the United States, then in such case he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law: *Provided*, That upon filing in the local land office notice of the beginning of such absence the entryman shall be entitled to a continuous leave of absence from the land for a period not exceeding five months in each year after establishing residence, and upon the termination of such absence the entryman shall file a notice of such termination in the local land office, but in case of commutation the fourteen months' actual residence required by law must be shown, and the person commuting must be at the time a citizen of the United States: *Provided further*, That when the person making entry dies before the offer of final proof those succeeding to the entry must show that the entryman had complied with the law in all respects to the date of his death, and that they have since complied with the law in all respects, as would have been required of the entryman had he lived, excepting that they are relieved from any requirement of residence upon the land: *Provided further*, That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry and until final proof, except that in the case of entries under section 218(f) of this title, double the area of cultivation herein provided shall be required, but the Secretary of the Interior may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation: *And provided further*, That the above provision as to

cultivation shall not apply to entries under the Act of April 28, 1904, commonly known as the Kinkaid Act [43 U.S.C. 224], or entries under the Act of June 17, 1902, commonly known as the reclamation Act, and that the provisions of this section relative to the homestead period shall apply to all unperfected entries as well as entries hereafter made upon which residence is required.

Alaska Native Claims Settlement Act,
\$2(b); 43 U.S.C. \$1601(b).

Congress finds and declares that—

(a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;

(b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;

Alaska Native Claims Settlement Act,
§14(g); 43 U.S.C. §1613(g).

All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented, and a lease issued under section 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State. The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the State or the United States, unless the agency responsible for administration waives administration. In the event that the patent does not cover all of the land embraced within any such lease, contract, permit, right-of-way, or easement, the patentee shall only be entitled to the proportionate amount of the revenues reserved under such lease, contract, permit, right-of-way, or easement by the State or the United States which results from multiplying the total of such revenues by a fraction in which the numerator is the acreage of such

lease, contract, permit, right-of-way, or easement which is included in the patent and the denominator is the total acreage contained in such lease, contract, permit, right-of-way, or easement.

Alaska Native Claims Settlement Act,
§22(b); 43 U.S.C. §1621(b).

The Secretary is directed to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites (43 U.S.C. 682 ⁹), and who have fulfilled all requirements of the law prerequisite to obtaining a patent. Any person who has made a lawful entry prior to August 31, 1971, for any of the foregoing purposes shall be protected in his right of use and occupancy until all the requirements of law for a patent have been met even though the lands involved have been reserved or withdrawn in accordance with Public Land Order 4582, as amended, or the withdrawal provisions of this chapter: *Provided*, That occupancy must have been maintained in accordance with the appropriate public land law: *Provided further*, That any person who entered on public lands in violation of Public Land Order 4582, as amended, shall gain no rights.

43 U.S.C. §1632(a).

(a) Except for administrative determinations of navigability for purposes of determining ownership of submerged lands under the Submerged Lands Act [43 U.S.C. 1301 et seq., 1311 et seq.], a decision of the Secretary under this chapter or the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] shall not be subject to judicial review unless such action is initiated before a court of competent jurisdiction within two years after the day the Secretary's decision becomes final or December 2, 1980, whichever is later: *Provided*, That the party seeking such review shall first exhaust any administrative appeal rights.

AS (Alaska Statutes) 9.10.230:

Sec. 09.10.230. Certain actions relating to real property. No person may bring an action for the determination of a right or claim to or interest in real property unless commenced within the limitations provided for actions for the recovery of the possession of real property. But no person may bring an action to set aside, cancel, annul, or otherwise affect a patent to land issued by this state or the United States, or to compel a person claiming or holding under a patent to convey the land described in the patent or a portion of the land to the plaintiff in the action, or to hold the land in trust for or to the use and benefit of the plaintiff, or on account of any matter, thing, or transaction which was had, done, suffered, or transpired before the date

of the patent unless commenced within 10 years from the date of the patent. In an action upon a new promise, fraud, or mistake, the running of the time within which an action may be commenced starts from the making of the new promise or the discovery of the fraud or mistake. This section does not bar an equitable owner in possession of real property from defending possession by means of the equitable title. The right of an equitable owner to defend possession in an action or by complaint for injunction is not barred by lapse of time while an action for the possession of the real property is not barred by the provisions of this chapter.

(2)
No. 87-642

Supreme Court, U.S.
FILED
NOV 13 1987
JOSEPH R. SPANIO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

o

JAMES W. LEE, RALPH A. EKLUND
and CORA CARR,

Petitioners,

v.

EKLUTNA, INC., COOK INLET REGION, INC.,
UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR, and
DIRECTOR, BUREAU OF LAND MANAGEMENT,

Respondents.

o

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

o

**RESPONDENT, EKLUTNA, INC.'S
BRIEF IN OPPOSITION**

o

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QUESTION PRESENTED

Should this court grant certiorari to determine whether the Ninth Circuit Court of Appeals was correct in dismissing claims against Native corporations and the United States based upon the Quiet Title Act's twelve-year statute of limitations?

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STATEMENT OF THE CASE

James Lee, Ralph Eklund, and Warren Carr (Plaintiff Cora Carr's late husband) (hereinafter collectively referred to as "the claimants") each filed a "Notice of Location of Settlement or Occupancy Claim in Alaska" embracing, *inter alia*, the land now in dispute, in 1957. CR¹ 87, 80 and 79 (BLM files). The claimants' entries occurred over thirty years after Power Site Classification ("PSC") 107 withdrew the land they now claim from appropriation under the public land laws for power site purposes, and seven years after PSC 399 withdrew all unsurveyed lands not reserved by PSC 107, lying below the 500 foot contour level along the Eagle River in the same township. *Id.* Although the Federal Power Commission ("FPC") thereafter determined that the value of the land would not be injured or destroyed for purposes of power development by location or entry, *id.*, the disputed land was never opened to homestead entry.

At the time the claimants filed their notices of location, they were notified in writing that "OCCUPANCY OR USE IS AT YOUR OWN RISK UNTIL FURTHER NOTICE FROM THE LAND OFFICE." CR 87, 80 and 79. Shortly thereafter, the claimants were notified that a portion of their claims were withdrawn from settlement or occupancy. *Id.* The FPC explained in 1959 that restoration is a function of the Bureau of Land Management

1. "CR" refers to pre-consolidation pleadings in Lee and post-consolidation pleadings in all three cases (District Court No. A79-336); "CR-EK" refers to pre-consolidation pleadings in Eklund (District Court No. A80-301); and "CR-CA" refers to pre-consolidation pleadings in Carr (District Court No. A82-411).

("BLM") and no such restoration had been made. CR 76, Ex. 4. The claimants and other settlers in the area sent a letter to the Secretary of the Interior in 1959 asking for clarification of their situation. CR 108, Ex. K. The Assistant Secretary responded that the BLM did not intend to revoke the power site reserve, and that if it did so, preference would go to other persons or entities. The homestead claimants would be granted no preference rights, and were currently in trespass. CR 108, Ex. L. The claimants' homestead entries were therefore denied by the BLM in 1959. CR 87, 80 and 79.

Lee nevertheless filed a homestead entry final proof covering 160 acres in 1962. CR 87. However, his final proof indicated a deficit in his cultivation requirements. *Id.* Thereafter, Lee and his attorney met with the BLM to attempt a compromise. CR 87; CR 76, Ex. 20. Lee was allowed to "clarify" his final proof testimony at which time he increased the amount of acreage he claimed cultivated. He was required to build a habitable dwelling on the 95 acres located outside the withdrawn area and cultivate acreage in this area. CR 87. His prior residency on lands withdrawn from entry was considered "constructive" for purposes of gaining title to the 95 available acres. CR 76, Ex. 21, 22, 23. Lee accepted the settlement and compromise, and in accordance therewith, submitted proof of construction of a habitable dwelling and cultivation as required. CR 87. Although he was represented by counsel, Lee failed to appeal the BLM's decision not to grant him the withdrawn 65 acres, CR 76, Ex. 21, and in November, 1964, patent was issued to Lee for the 95 available acres. CR 76, Ex. 25. Lee thereafter had no application pending for additional acreage and took

no further action to pursue his original homestead claim. However, in 1967, Lee petitioned the BLM for restoration of the disputed land, which would have opened the land to homestead entry by interested persons. CR 87. However, Lee's petition was rejected in 1968, which decision was affirmed by the national office. Lee failed to make further appeal to the Secretary. *Id.*

Eklund also began residing upon the land after being warned that a portion of the land he sought was not subject to homestead entry. CR 80. In addition, Eklund filed a petition with the FPC seeking restoration from the power site withdrawal, and was informed that such restoration could only be achieved by BLM order and that no preference rights would be acquired if the land were restored. CR-EK 12, Ex. D. After the BLM again advised Eklund of the conflict between his entry and the withdrawal, in 1959 Eklund nevertheless filed his final proof. CR 80. Eklund had conflicts both with the land withdrawal and with other homestead claimants. In order to settle with the government and the other claimants, Eklund agreed to file an amended homestead entry application excluding the withdrawn land and seeking patent to 50 acres of available land. *Id.* Per this agreement, Eklund was also allowed to file for an additional contiguous 40 acre parcel. As with Lee, although the statutory life of Eklund's claim had expired and he was lacking in cultivation outside the withdrawal area, the BLM allowed his cultivation to be considered "constructive." Eklund confirmed the agreement and complied with the requirements. *Id.* Therefore, patent was issued for the 50 acres outside the withdrawal in 1964, and for an additional 40 acres in 1972. *Id.* As with Lee, this ended Eklund's case, he had no application

pending, and took no further action on his original homestead claim. His file was closed. CR-EK 9, Ex. O at 2.

As with Lee and Eklund, Carr failed to appeal the 1959 decision of the BLM that a portion of the lands he claimed were not subject to settlement. CR 79. Carr also failed to comply with improvement and cultivation requirements. During the 1963 inspection period, Carr's clearings were found to be overgrown, only 1.1 cultivated acres were located outside the withdrawal, and the house was not being used. *Id.* In addition, Carr was also in conflict with other homesteaders. *Id.* In 1963, a meeting was held in which Carr, Eklund and other homestead claimants came to an agreement concerning the land each of them was claiming. Carr, Eklund, and the other homestead claimants signed an agreement to amend their homestead applications so as not to conflict with one another or with the power site withdrawal. *Id.* Carr's house was within the withdrawn area, but because the garage was "probably" on the correct parcel, the BLM accommodated Carr and decided to "deem" the garage a "habitable house," and in 1964, Carr was issued patent to 8.75 acres. *Id.* Thereafter, Carr's homestead file too was closed, he had no further application pending, and took no further action on his original claim. CR-CA 6, Ex. N at 2.

Upon the adoption of the Alaska Native Claims Settlement Act ("ANCSA"), the lands were again withdrawn to allow for selection and conveyance to Native corporations in settlement of their aboriginal claims. 43

U.S.C. § 1610(a). Eklutna, Inc. ("Eklutna")² selected the disputed lands, the required notice was given by publication, and patent was issued to Eklutna in 1979. CR 87; CR 76, Ex. 34; CR-EK 9, Mothershead Affidavit ¶ 15. Having compromised and settled their claims in 1963-1964, *Lee v. United States*, 629 F.Supp. 721, 724-25 (D. Alaska 1985), and having no applications pending, the homestead claimants were no longer of record at this time.

Fifteen years after accepting the settlement and receiving patent to 95 acres, Lee filed a complaint in federal district court. CR 1. Over 17 years after settling his claim and receiving patent to 50 acres, Eklund filed suit. CR-EK 1. Carr waited until over 19 years after settlement and acceptance of patent to file. CR-CA 1. The three cases were consolidated in 1983, CR 61, and the district court dismissed the claimants' claims against the defendants in 1986. 629 F.Supp. 721. The judgment of the district court was affirmed on appeal. 809 F.2d 1406 (9th Cir. 1987).

REASONS WHY THE PETITION SHOULD BE DENIED

The claimants base their petition for a writ of certiorari on three grounds. First, the claimants allege that the decision of the Ninth Circuit Court of Appeals holding the United States is an indispensable party in this

2. Pursuant to Supreme Court Rule 28.1, the following is the only subsidiary (except wholly owned subsidiaries) or affiliate of Eklutna, Inc.: Eagle River Valley Resort, Inc. Eklutna has no parent company.

action conflicts with decisions of this court and a decision of the First Circuit Court of Appeals. Second, the claimants allege that their ANCSA § 22(b) claims are not governed by the Quiet Title Act's statute of limitations, 28 U.S.C. § 2409a(g), but by 43 U.S.C. § 1632(a). Third, the claimants allege that the statute of limitations should be tolled by alleged government misrepresentations.

Eklutna will show that the decision below is not in conflict with existing law, and that the portion dealing with the issue of indispensable parties is applicable only specifically to lands conveyed to ANCSA recipients by the United States, not to quiet title actions in general.

I. THE UNITED STATES IS AN INDISPENSABLE PARTY IN THIS ACTION

A. Conveyances to Native Corporations From the United States Pursuant to ANCSA are Unique and Require the Presence of the United States as a Party When Attacked

ANCSA was enacted in 1971 as a comprehensive settlement of Native claims based upon aboriginal title. 43 U.S.C. § 1601(a). If Eklutna loses this action on the merits and has to convey the disputed land to the claimants under their constructive trust theory, the United States will have to make up the acreage to Eklutna. 43 U.S.C. § 1621(j)(2). Whether Eklutna conveys the land directly to the claimants or whether the land goes through the United States to the claimants, the end result is the same—that the United States will still have to convey more federal land to Eklutna. This prejudice to the United States in the event Eklutna loses on the merits (not any trust

status)³ is a major factor in determining that the United States is an indispensable party. *Nichols v. Rysavy*, 809 F.2d 1317, 1333 (8th Cir.), *cert. denied*, 108 S. Ct. 147 (1987); *Sierra Club v. Leathers*, 754 F.2d 952, 954 (11th Cir. 1985); *Nichols v. Rysavy*, 610 F.Supp. 1245, 1253 (D.C.S.D. 1985), *aff'd*, 809 F.2d 1317 (8th Cir.), *cert. denied*, 108 S.Ct. 147 (1987); *Zapata v. Smith*, 437 F.2d 1024, 1026-27 (5th Cir. 1971); *Johnson v. Chilkat Indian Village*, 457 F.Supp. 384, 387 (D. Alaska 1978).

The result of this suit on the merits will depend entirely upon whether the claimants were entitled to patent from the United States government. *Nichols v. Rysavy*, 809 F.2d at 1333:

[T]he result of this suit, on the merits, would depend entirely on whether the United States acted legally or illegally in granting fee patents under the blood quantum policy. If the United States issued the patents legally, then appellants' action is groundless. "In short, the government's liability cannot be tried 'behind its back' ". (citations omitted).

See also *American Guaranty Corporation v. Burton*, 380 F.2d 789, 791 (1st Cir. 1967):

3. Although the claimants contend that the Ninth Circuit's decision implies that ANCSA grants are subject to trust status, the determination that the United States is an indispensable party in this action hardly implies that ANCSA conveyances are subject to any trust status. The decision only provides that closed cases cannot be resurrected under ANCSA to take land away from ANCSA recipients. Whether the United States legally or illegally denied patent to the claimants is the issue on the merits of this action, mandating that the United States be a party to any such action.

A judgment for appellant would necessarily be based on a holding that the United States had no right in the fund. Thus, the United States is an indispensable party to the action Since the United States is not and cannot be joined as a defendant, the action cannot proceed.

The claimants are attempting to narrow the issues into a dispute between only themselves and Eklutna, when this simply cannot be done. *Johnson v. Chilkat Indian Village*, 457 F.Supp. at 387 (Plaintiff sought to narrow the issues to a dispute over the conversion of personal property unrelated to the right of plaintiff to remove works of art from the Indian Village, when in fact, a decision in the Village Council's absence would prejudice its interest in the dispute). *See also Sierra Club v. Leathers*, 754 F.2d at 954 (Where, in effect, plaintiff alleged that South Carolina breached its agreement, and the requested relief would result in a reduction of federal highway funds to South Carolina, the state was an indispensable party to the litigation); *Chicago Teachers Union v. Johnson*, 639 F.2d 353, 358-59 (7th Cir. 1980) (Where federal defendants would ultimately have to process claims, joinder was necessary so plaintiffs could be accorded complete relief and would not be faced with the prospect of relitigating the issue); *Zapata v. Smith*, 437 F.2d at 1026-27 (The government was an indispensable party where there was "an indirect effort to collect a debt allegedly owed by the government in an action to which the government has not consented"). The "United States is the party who issued the fee patent in question, thus setting the entire series of events in motion that resulted in the action." *Nichols*, 610 F.Supp. at 1253.

In addition, under the Quiet Title Act, when a decision is adverse to the United States, "the United States nevertheless may retain such possession or control of the real property . . . upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control." 28 U.S.C. 2409a(b). Thus, the United States, if it loses a case on the merits, has the option of conveying the land to the claimants or paying compensation. *Id.*; *Block v. North Dakota*, 461 U.S. 273, 283, 285 (1983). To allow a constructive trust to be imposed directly against Eklutna prevents the United States from exercising its option. This further prejudice to the United States is even more reason why it is necessary that the United States be a party to this action. See *American Guaranty Corporation v. Burton*, 380 F.2d at 791:

[T]he United States was an indispensable party since the claim sought relief "which would expend itself upon the United States Treasury"

. . . .

A second question . . . is whether a judgment for plaintiff would "restrain the Government from acting, or . . . compel it to act." (citations omitted).

Eklutna is an innocent party, having selected available lands in settlement of its aboriginal claims according to the public land records. Any dispute as to whether the claimants should have received patent in the 1950's is between the claimants and the United States.⁴ To require

4. As the district court determined, the claimants may have a claim for money damages against the United States in the United States Claims Court. *Lee*, 629 F. Supp. at 725, 733-34.

Eklutna to litigate the position of the United States on the merits is unfair to both Eklutna and the United States.

B. Constructive Trust is Not Appropriate in This Action

Citing a string of late 19th and early 20th century cases, the claimants contend that because they are suing under a constructive trust theory, the United States need not be involved in this case. The cases cited by the claimants, however, arise out of a legal environment peculiar to the late 19th century and are not relevant in this action. They all predate the adoption of the Administrative Procedure Act ("APA") (Act of June 11, 1946, 60 Stat. 243), as well as the adoption of 28 U.S.C. §§ 1346(f) and 2409a(g) (Oct. 25, 1972, 86 Stat. 1176). Because these cases predate the adoption of the APA, they are all based upon a principle applicable at that time that claimants could not bring suit so long as the United States held title to the land in issue. *See, e.g., Johnson v. Towsley*, 80 U.S. 72, 87 (1871):

This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government, and in reference to the proceedings before the officers intrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after the title had passed from the government, and the question became one of private right, whether, according to the established rules of equity

and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another.

See also Bockfinger v. Foster, 190 U.S. 116, 121 (1903) (Because ownership still resided in the United States, the court did not have jurisdiction to hear the dispute).

Therefore, at the time of these cases, those who were in the position of the claimants had no remedy so long as the United States held title to the land. It is understandable that this equitable doctrine permitted the court to take jurisdiction and use its equitable powers to impose a constructive trust in favor of a deserving claimant who had no other remedy until title had passed from the government.

The doctrine the claimants urge is now obsolete. The APA provides adverse claimants to the public lands with the right to immediate appeal of final adverse decisions of administrative agencies, and has done so since 1946, years before the claimants settled on the land at issue and before their entries were formally rejected in 1959. 60 Stat. 243 (1946). The constructive trust doctrine is no longer needed to obviate the harsh results which existed prior to the waiver of sovereign immunity and the establishment of jurisdiction brought into effect by the APA. The claimants should not be allowed to sit on their rights for years without exhausting their administrative remedies or appealing adverse decisions to the courts, and wait for the government to convey the land to an innocent third party for an opportunity to impose a constructive trust in their favor.

Further, the cases cited by the claimants are ones in which the United States suffered no prejudice by the imposition of a constructive trust against the patentee. *See, e.g., Daniels v. Wagner*, 237 U.S. 547 (1915). As discussed above, in this case, the United States will be prejudiced by the requirement that it convey to Eklutna the full amount of any acreage Eklutna is deemed to be holding in trust for the claimants.

II. THE QUIET TITLE ACT BARS THE CLAIMANTS' SUIT

Because the United States is an indispensable party, the Quiet Title Act bars this action. 28 U.S.C. § 2409a(g). The claimants cannot circumvent the Quiet Title Act through the use of 28 U.S.C. § 1632, because the Quiet Title Act is the *exclusive* means of challenging the United States' title to real property. *Block v. North Dakota*, 461 U.S. 273, 286 (1983); *California v. Arizona*, 440 U.S. 59, 61-62 (1979); *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1469 (10th Cir. 1987).

The twelve-year Quiet Title Act statute of limitations begins to run when the claimants "knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). The record reflects that the claimants knew of the claim of the United States at least in 1959 when their claims upon the unavailable lands were formally denied. None of the claimants filed suit before 1979, much more than twelve years after they "knew or should have known of the claim of the United States." The claimants were consistently informed of the claim of the United States until they eventually compromised and settled their claims with the BLM in 1963-64, still outside the limitations period.

Section 22(b) of ANCSA (43 U.S.C. § 1621(b)) only preserved what rights the claimants already had. It did not create any new rights. The claimants are attempting to resurrect claims which died years ago by failure to exhaust administrative remedies, failure to appeal administrative decisions, and failure to bring timely suit under the Quiet Title Act. They cite 43 U.S.C. § 1632(a) to argue that the statute of limitations on their homestead claims does not expire until two years after the decision to convey to Eklutna. However, 43 U.S.C. § 1632(a) provides that "the party seeking such review shall first exhaust any administrative appeal rights." The claimants failed to do so back in the 1950's and early 1960's. Also, if the claimants are correct, then all applications since Alaska was purchased from Russia, for homestead, trade and manufacturing sites or any other purposes, which were ever denied on all 40 million acres to be conveyed to Native corporations under ANCSA, can be reopened and given a new two-year statute of limitations dating from the time of the decision to convey to a Native corporation. Congress did not intend to re-open all closed homestead files on land patented to Natives under ANCSA and allow an additional two years in which to contest the denial of their homestead claims. ANCSA was a settlement of aboriginal claims, and was intended to create finality to such claims, not to resurrect stale claims and extend or renew the period in which to contest old decisions.

III. THE QUIET TITLE ACT'S TWELVE-YEAR STATUTE OF LIMITATIONS WAS NOT TOLLED BY ALLEGED GOVERNMENT MISREPRESENTATIONS

The government has consistently represented its position vis-a-vis the disputed lands to the claimants—that while subject to power site withdrawals, the land was unavailable for homestead entry. The claimants disagree with the government's position and contend that this somehow excuses them from appealing the BLM's adverse decisions as to their claims. Clearly, this is not a "misrepresentation" which gives the claimants the benefit of the doctrine of equitable tolling against the United States. Furthermore, the claimants maintain their position even in light of the fact that while represented by counsel, they compromised and settled their claims with the BLM in 1963-64.

This court has held that the statute of limitations in quiet title actions is jurisdictional. *United States v. Mottaz*, 106 S.Ct. 2224, 2229 (1986); *Block v. North Dakota*, 461 U.S. 273, 287 (1983). The limitations period is also to be strictly construed. *Block*, 461 U.S. at 287. The government should not be equitably barred from asserting such strict jurisdictional requirements.⁵ *McIntyre v. United States*, 789 F.2d 1408, 1411 (9th Cir. 1986); *Burns v. United States*, 764 F.2d 722, 724 (9th Cir. 1985). Compare *Bowen v. City of New York*, 106 S. Ct. 2022, 2029-30 (1986)

5. The case cited by the claimants for the proposition that their equitable theory "is read into every federal statute of limitation," *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1945), refers to a situation "where a plaintiff has been injured by fraud." There has been no allegation of fraud in the present action.

("Tolling, in the rare case such as this, does not undermine the purpose of the 60-day [non-jurisdictional] limitation period . . ." in a statute which was designed to be "unusually protective" of claimants, and where "Congress has authorized the Secretary to toll the 60-day limit."). It would be absurd to allow equitable tolling when the claimants were represented by legal counsel and refused to appeal adverse decisions, instead compromising their claims with the BLM. Although the claimants allege that "they made diligent inquiry," Petition for Writ of Certiorari at 40, they apparently failed to make such inquiry of their own lawyer, or if they did so, made a decision to settle, rather than appeal, their claims. *See, e.g., United States v. Kubrick*, 444 U.S. 111, 124 (1979) (If a claimant was mistakenly told that he does not have a case, the Court sees "no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed . . .").

CONCLUSION

For the foregoing reasons, the petitioner's claims that the Ninth Circuit's decision is inconsistent with federal case law are without merit. The decision of the Ninth Circuit is consistent with the principles enunciated in prior decisions of federal courts and with applicable statutory law. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

28 U.S.C. § 1346(f) (1972)

The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

43 U.S.C. § 1610(a) *Description of Withdrawn Public Lands; Exceptions; National Wildlife Refuge Lands Exception; Time of Withdrawal*

(1) The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:

(A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b) of this section;

(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

The following lands are excepted from such withdrawal: lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Numbered 4.

(2) All lands located within the townships described in subsection (a)(1) hereof that have been selected by, or

tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from the creation of third party interests by the State under the Alaska Statehood Act.

(3)(A) If the Secretary determines that the lands withdrawn by subsections (a)(1) and (2) hereof are insufficient to permit a Village or Regional Corporation to select the acreage it is entitled to select, the Secretary shall withdraw three times the deficiency from the nearest unreserved, vacant and unappropriated public lands. In making this withdrawal the Secretary shall, insofar as possible, withdraw public lands of a character similar to those on which the village is located and in order of their proximity to the center of the Native village: *Provided*, That if the Secretary, pursuant to section 1616, and 1621(e) of this title determines there is a need to expand the boundaries of a National Wildlife Refuge to replace any acreage selected in the Wildlife Refuge System by the Village Corporation the withdrawal under this section shall not include lands in the Refuge.

(B) The Secretary shall make the withdrawal provided for in subsection (3)(A) hereof on the basis of the best available information within sixty days of December 18, 1971, or as soon thereafter as practicable.

43 U.S.C. § 1621(j)(2) *Interim Conveyances and Under Selections*

Where lands selected and conveyed, or to be conveyed to a Village Corporation are insufficient to fulfill the

Corporation's entitlement under section 1611(b), 1613(a), 1615(b), or 1615(d) of this title, the Secretary is authorized to withdraw twice the amount of unfulfilled entitlement and provide the Village Corporation ninety days from receipt of notice from the Secretary to select from the lands withdrawn the land it desires to fulfill its entitlement. In making the withdrawal, the Secretary shall first withdraw public lands that were formerly withdrawn for selection by the concerned Village Corporation by or pursuant to section 1610(a)(1), 1610(a)(3), 1615(a), or 1615(d) of this title. Should such lands no longer be available, the Secretary may withdraw public lands that are vacant, unreserved, and unappropriated, except that the Secretary may withdraw public lands which had been previously withdrawn pursuant to section 1616(d) of this title. Any subsequent selection by the Village Corporation shall be in the manner provided in this chapter for such original selections.

*60 Stat. 243 § 10 (1946) Administrative Procedure Act
(codified in former 5 U.S.C.
§ 1009)*

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) **RIGHT OF REVIEW.**—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

....

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority. . . .

(3)
No. 87-643

Supreme Court, U.S.
FILED

DEC 31 1987

ROBERT E. SPANIO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES W. LEE, ET AL., PETITIONERS

v.

EKLUTNA, INC., ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' suits against the United States claiming title to land under the homestead laws are barred by the 12-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(g), because petitioners knew or should have known of the United States' claim to the land when their homestead claims were denied by the Secretary of the Interior in 1961 and 1964.

2. Whether the United States is an indispensable party to petitioners' suits against the respondent Alaska Native corporations that hold the disputed land under patents issued by the United States pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, because, under ANCSA, the effect of a judgment in petitioners' favor would be to enable the Native corporations to obtain additional land from the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-642

JAMES W. LEE, ET AL., PETITIONERS

v.

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OPINIONS BELOW

The second amended opinion of the court of appeals (Pet. App. 2a-15a) is reported at 809 F.2d 1406. The opinion of the district court (Pet. App. 16a-47a) is reported at 629 F. Supp. 721.

JURISDICTION

The judgment of the court of appeals (Pet. App. 48a-49a) was entered on March 10, 1987, and a timely petition for rehearing was denied on July 22, 1987 (Pet. App. 50a-51a). The petition for a writ of certiorari was filed on October 19, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the ownership of several parcels of land in the Eagle River Valley near Anchorage, Alaska. The land in question was patented by the United States in 1979 to two Native corporations that were established

under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.* Prior to that time, however, the land was included in Power Site Classification 399, which was issued by the United States Geological Survey in 1950, pursuant to 43 U.S.C. 31 and Section 24 of the Federal Power Act, 16 U.S.C. 818.¹

Section 24 of the Federal Power Act provides that land included in a proposed power project site shall be "reserved from entry, location, or other disposal under the laws of the United States * * *." The issuance of Classification 399 in 1950 therefore had the effect of withdrawing the parcels at issue in this case from entry under the public land laws (Pet. App. 6a). Section 24 of the Federal Power Act further provides that if the FPC determines that any of the land set aside for a power site will not be injured or destroyed for purposes of power development if it is made available for location, entry, or selection under the public land laws, the Secretary of the Interior, after giving 90 days' notice to the Governor of the State, shall declare the land open to entry under those laws. In 1952, the FPC determined that certain land covered by Power Site Classification 399 would not be injured for purposes of power development by location or entry under the public land laws. However, the Secretary of the Interior did not thereafter revoke the withdrawal and declare the land open for entry or settlement. Pet. App. 6a, 17a-18a.

In 1957, each of the three petitioners settled on a separate parcel of land in the Eagle River Valley, with the expectation of homesteading it.² Some of the land on

¹ The FPC has since been abolished and its duties have been transferred to the Secretary of Energy and the Federal Energy Regulatory Commission. See 42 U.S.C. 7151(b), 7171(a), 7172(a), 7291 and 7293.

² Petitioners Lee and Eklund settled on two of the parcels. Petitioner Carr is the widow of Warren Carr, who was the actual entryman on the third parcel. For the sake of convenience, we shall refer to all three entrymen as petitioners.

which petitioners settled was open for homesteading. However, the Bureau of Land Management (BLM) informed petitioners that other portions of their proposed homestead sites—the portions at issue here—were within Power Site Classification 399 and for that reason were not available for entry until BLM formally opened them for settlement. Similarly, the Assistant Secretary informed petitioners in 1959 that portions of their proposed homestead sites were not open to entry; that further action by the Department of the Interior with respect to the land would have to await completion of an engineering survey; and that even if the power site withdrawal were revoked, the State of Alaska and veterans would have preference rights. Pet. App. 6a-7a, 17a-18a.

In 1961, BLM filed a platted survey of the area that delineated, *inter alia*, the boundaries of Classification 399 in relation to the potential homestead sites selected by petitioners. 26 Fed. Reg. 2486 (1961). Immediately thereafter, on April 27, 1961, BLM issued final decisions rejecting petitioners' entries insofar as they conflicted with the power site withdrawal. Finally, in 1964, petitioners entered into compromise arrangements with BLM that enabled them to submit proof of occupancy for those portions of their proposed entries that were located outside the withdrawal area and to receive patents from the United States for those portions. Pet. App. 7a, 18a-19a; see *Eklutna Br.* in Opp. 3-5.

2. On December 18, 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, which was intended, *inter alia*, to settle the aboriginal land claims of Native Alaskans. Under Section 4 of the Act, 43 U.S.C. 1603, all claims of aboriginal title in Alaska were extinguished. See *Amoco Production Co. v. Village of Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 3-4. At the same time, Congress provided for regional and village Native corporations organ-

ized under ANCSA to select and receive title to public land in Alaska. See 43 U.S.C. 1610-1614. Pursuant to these provisions, the Native village corporation of Eklutna filed a land selection that included the parcels at issue here. In 1979, the United States issued Eklutna a patent to the surface estate in the land and issued Cook Inlet Region, Inc., the regional Native corporation for the area, a corresponding patent to the subsurface estate. Pet. App. 20a.

3. In 1979, 1980 and 1982, petitioners filed the instant consolidated actions against the Native corporations and the United States. In their amended complaints, petitioners sought (i) patents from the United States to the portion of the Native corporations' land for which petitioners had sought to make homestead entries some years earlier, and (ii) a ruling that the Native corporations held those portions subject to a constructive trust for the benefit of petitioners. Pet. App. 20a-21a.³

On January 23, 1985, the district court granted summary judgment in favor of the respondents (Pet. App. 16a-47a). The court held that under *Block v. North Dakota*, 461 U.S. 273 (1983), petitioners' claims against the United States for patents to the land are governed by the Quiet Title Act (QTA), 28 U.S.C. 2409a, and are barred by that Act (Pet. App. 22a-23a). The court first held that, because the United States disclaimed all title to the parcels at issue here when they were patented to the Native corporations in 1979, the court lacked jurisdiction under the QTA by virtue of 28 U.S.C. 2409a(e),⁴ which

³ Petitioners also filed monetary claims against the United States for an alleged taking of their property. The district court dismissed those claims, holding that because the amount in controversy exceeded \$10,000, the Claims Court had exclusive jurisdiction under 28 U.S.C. 1491 (Pet. App. 45a-46a). Petitioners did not seek review of that ruling in the court of appeals.

⁴ In 1986, after the district court rendered its decision, Congress added a new Subsection (c) to 28 U.S.C. 2409a, and succeeding

provides that the QTA jurisdiction of the district court shall cease if the United States disclaims all interest in the land (Pet. App. 23a-24a). In addition, the court held that these suits are barred by the 12-year statute of limitations in 28 U.S.C. 2409a(g), because petitioners knew or should have known of the United States' claim to the land in 1961, when BLM issued the final decisions denying their homestead claims, or at the very latest in 1964, when petitioners reached compromise agreements with BLM under which they were granted patents only for the portions of their original entries that were outside the withdrawal area (Pet. App. 25a-26a).

The district court also rejected petitioners' claims against the respondent Native corporations (Pet. App. 29a-42a). Relying on *Milwaukee v. Illinois*, 451 U.S. 304, 313-319 (1981), the court first held that the comprehensive statutory framework of ANCSA precludes suits based on a common law theory of constructive trust with respect to lands patented to Native corporations under ANCSA (Pet. App. 29a-34a). The court then concluded that under the operative statutory provision—Section 22(b) of ANCSA, 43 U.S.C. 1621(b)—claims under the homestead laws must be presented to the Secretary prior to the issuance of a patent to a Native corporation, so that land covered by homestead entries may be excluded from the grant to the Native corporation (Pet. App. 33a-41a). Accordingly, the court held that petitioners have no cause of action against the respondent Native corporations under Section 22(b) of ANCSA because that Section imposes obligations only on the Secretary (Pet. App. 41a-42a) and that petitioners have no cause of action against the federal respondents under Section 22(b) of ANCSA because any such cause of action

subsections were redesignated accordingly. See Act of Nov. 4, 1986, Pub. L. No. 99-598, 100 Stat. 3351. The citations in the text are to the amended version of 28 U.S.C. 2409a.

was barred by the QTA before the land in question was patented to the Native corporations under ANCSA (Pet. App. 42a-44a).

4. The court of appeals affirmed the judgment of the district court in favor of both the federal and the non-federal respondents (Pet. App. 2a-14a). The court of appeals agreed with the district court that petitioners' claims against the United States are governed by the QTA and are barred by that Act, because the United States has disclaimed title to the land since it was conveyed to the Native corporations in 1979 and because the 12-year period within which a QTA action could be filed had in any event expired (Pet. App. 9a-12a).

The court of appeals also affirmed the district court's dismissal of petitioners' actions against the respondent Native corporations, on the ground that the United States is an indispensable party that cannot be joined because of the bars to suit under the QTA (Pet. App. 13a-14a). The court acknowledged that the QTA directly governs only suits against the United States and that generally a claimant who cannot sue the United States under that Act is not thereby barred from suing a non-federal party who claims an interest in the same parcel of land (*id.* at 13a). But the court reasoned that in order for petitioners to challenge the patents issued to the Native corporations in this case, they must first establish their own prior entitlement to the land in question — a result that could be accomplished only in direct proceedings against the United States (*id.* at 13a-14a).

ARGUMENT

The court of appeals correctly affirmed the district court's dismissal of petitioners' claims against both the United States and the Native corporations. That dismissal, under the unique statutory framework of the Alaska Native Claims Settlement Act, does not conflict with any

decision of this Court or of another court of appeals, and it presents no question of general importance warranting review by this Court. The petition for a writ of certiorari therefore should be denied.

1. a. The court of appeals correctly held that petitioners' claims against the United States are barred by the 12-year statute of limitations in the Quiet Title Act. Under 28 U.S.C. 2409a(g), any QTA action is barred "unless it is commenced within twelve years of the date upon which it accrued," and an action "shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." Both courts below found that petitioners knew or should have known of the United States' claim to the land in 1961, when BLM rendered the final decisions denying their homestead claims, or at the very latest in 1964, when petitioners entered into compromise agreements that enabled them to obtain homestead patents only to the portions of their proposed entries that were outside the power-site withdrawal area. See Pet. App. 11a, 25a-27a. Those dates are more than 12 years prior to the filing of the instant suits against the United States beginning in 1979, and petitioners' claims against the United States therefore are time-barred.

b. Petitioners do not challenge the determination by both courts below that they knew or should have known of the adverse claim of the United States more than 12 years before they filed suit, and that fact-bound issue does not in any event warrant review by this Court. However, relying on this Court's decision in *Bowen v. City of New York*, No. 84-1923 (June 2, 1986), petitioners contend (Pet. 37-42) that the running of the 12-year statute of limitations under the QTA should be deemed to have been tolled on equitable grounds prior to 1979. This contention is without merit. The Court stressed in *City of New York* that principles of equitable tolling may be invoked in suits

against the federal government only “[w]hen application of the [tolling] doctrine is consistent with Congress’ intent in enacting a particular statutory scheme” (slip op. 11). The bases for the Court’s holding in *City of New York* that equitable tolling is consistent with the congressional intent underlying the Social Security Act do not suggest that equitable tolling is appropriate in this case under the QTA.

First, the Court observed in *City of New York* that the 60-day limitations period in 42 U.S.C. 405(g) “is contained in a statute that Congress designed to be ‘unusually protective’ of claimants” (slip op. 11-12, quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)). The QTA does not manifest a comparable solicitude for persons who challenge the United States’ title to real property, and there is no reason to believe that such claimants are in special need of the sort of protection that the Court afforded the class of mentally ill disability claimants in *City of New York*.

Second, the Court found it significant in *City of New York* that 42 U.S.C. 405(g) on its face permits the Secretary of Health and Human Services to toll the 60-day limitations period, “thus expressing its clear intention to allow tolling in some cases” (slip op. 12). The QTA, by contrast, does not authorize an Executive official to extend the time for filing suit and does not otherwise manifest a congressional intention to allow tolling in certain circumstances. Indeed, 28 U.S.C. 2409a(g) is unusually explicit in specifying when a cause of action accrues: when the plaintiff “knew or should have known of the claim of the United States.” Where, as here, that statutory condition for triggering the limitation on suits under the QTA is satisfied, a court has no authority to toll the running of the limitations period.

Third, the Court stressed in *City of New York* that in addition to serving the usual purposes of a statute of limitations, the unusually short 60-day filing period under 42 U.S.C. 405(g) was designed “to move cases to speedy

resolution in a bureaucracy that processes millions of claims annually”—a purpose that “serves both the interest of the claimant and the interest of the Government” (slip op. 13). The Court concluded that judicial tolling of the 60-day period in “rare” Social Security cases would not undermine this additional statutory purpose of promoting administrative efficiency (*ibid.*). By contrast, the statute of limitations under the QTA was not intended to serve any additional purpose that protects the interests of the claimant and that might lend support to judicial tolling in certain circumstances. The QTA provision serves only the usual purpose of a statute of limitations—to protect the defendant (here, the United States) against stale claims. See *Block v. North Dakota*, 461 U.S. 273, 282-285 & n.20 (1983). That purpose would be substantially undermined by judicial tolling of the limitations period in this case.⁵

c. Even if equitable tolling were available on “rare” occasions under the QTA, as it is under the Social Security Act following *City of New York*, this case does not present an appropriate case for such extraordinary judicial intervention. In *City of New York*, the Court held that the 60-day period for seeking judicial review of the denial of

⁵ Petitioners contend (Pet. 35-37) that suits against the United States should be governed by the statute of limitations in 43 U.S.C. 1632(a), rather than that in the Quiet Title Act. The former provision states:

[A] decision of the Secretary under * * * the Alaska Native Claims Settlement Act * * * shall not be subject to judicial review unless such action is initiated before a court of competent jurisdiction within two years after the day the Secretary’s decision becomes final or December 2, 1980, whichever is later: *Provided*, That the party seeking such review shall first exhaust any administrative appeal rights.

As its language makes clear, this provision was intended to *limit* claims; it was not intended to *revive* claims that were already barred by another statute (e.g., the QTA) before the Secretary rendered the relevant decision under ANCSA.

disability claims was subject to equitable tolling because a secret administrative policy prevented the class of mentally ill claimants from knowing of the violation of their rights. See slip op. 11-13. In this case, there is no suggestion of a secret policy that might have prevented petitioners from knowing of the alleged violation of their rights. Petitioners rely (Pet. 5-6, 39) on the 1959 letter from the Assistant Secretary (see page 3, *supra*) as a justification for equitable tolling. That reliance, however, is misplaced, because the information in the 1959 letter was accurate: the Assistant Secretary correctly informed petitioners that the land in question would not be open to homestead entry until the Department of the Interior officially declared it to be open; that the Department was conducting an engineering study of the area; and that any homesteading of the land prior to the revocation of the power site withdrawal was a nullity. *United States v. Midwest Oil Co.*, 236 U.S. 459, 471 (1915); *Shiny Rock Mining Corp. v. United States*, 825 F.2d 216 (9th Cir. 1987).

Petitioners also argue (Pet. 4, 39) that the Secretary of the Interior had a duty to revoke the power-site withdrawal *immediately* after the FPC determined in 1952 that the land would not be injured for power development if it were opened to settlement and that the Assistant Secretary's 1959 letter was misleading because it did not inform petitioners of that supposed duty. But even if petitioners' view of the statutory scheme were correct, the Secretary's failure to revoke the power-site withdrawal immediately reflects nothing more than the fact that the Secretary took a different view of the law. Such a difference of legal opinion falls far short of the sort of affirmative misconduct that would be necessary to toll the running of the statute of limitations. Compare *United States v. Kubrick*, 444 U.S. 111, 123-124 (1979). Indeed, the first judicial decision addressing the question of the Secretary's duties following a no-injury determination was

Reeves v. Andrus, 465 F. Supp. 1065 (D. Alaska 1979), which was not rendered until after the statute of limitations had already run on petitioners' claims and many years after the FPC's no-injury determination at issue in this case. Moreover, *Reeves* did not hold that the Secretary had an inflexible duty to open such land to immediate settlement.⁶ And in any event, the legal principles on which *Reeves* was based were as accessible to petitioners as they were to the government. There accordingly was no "secret" governmental conduct in this case, as there was in *City of New York*. Thus, the Assistant Secretary's routine expression of the Department's legal views in 1959 does not amount to the "rare" instance of affirmatively misleading conduct that was found to justify judicial tolling in *City of New York*—even if we assume that the tolling principles articulated in that case are applicable in cases arising under the QTA.⁷

⁶ *Reeves* was brought by an individual who desired to homestead land that was the subject of a power site classification, but that the FPC had declared was not needed for power site purposes. The court in *Reeves* held that the Secretary should not have continued to reserve the land under Section 24 of the Federal Power Act. But the court further held that Section 24 is not self-executing and that the Secretary might well withdraw the land from settlement for some other reason (465 F. Supp. at 1070):

This does not mean that the Secretary must instantly implement the Commission's decision. In fact, 16 U.S.C. § 818 provides for a ninety day period after notice in which the State can exercise a preference right to the land. This ninety day period would allow the Secretary to determine whether there are any other public values or interests in the land that require the site to be withdrawn from entry under other powers possessed by the Secretary.

⁷ In *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), upon which petitioners rely (Pet. 38-39), the Court held that equitable tolling was proper because the defendant had affirmatively misled the plaintiff with respect to the time within which the plaintiff could file suit. Here, there is no suggestion that any government official misled petitioners regarding the running of the statute of limitations.

2. Petitioners further contend (Pet. 16-34) that even if their suits against the United States were properly dismissed, their suits against the Native corporations should have been permitted to proceed. In petitioners' view (see Pet. 21-24), this result is required by certain decisions of this Court, rendered long before passage of ANCSA in 1971 and the QTA in 1972, that permitted a suit seeking to establish a constructive trust over land for which a patent was erroneously issued by the United States, even though the United States was not a party. See, e.g., *Duluth & Iron Range R.R. v. Roy*, 173 U.S. 587 (1899), and *Ard v. Brandon*, 156 U.S. 537 (1895). Petitioners likewise argue that the court of appeals' decision erroneously permits the statute of limitations in the QTA to bar suits against private parties. Pet. 27-34. These arguments, however, miss the significance of the particular factual circumstances and statutory framework that govern this case.

The question whether a suit should be dismissed because of the absence of an "indispensable" party is governed by Rule 19 of the Federal Rules of Civil Procedure. Rule 19(a) sets forth the conditions for determining if a person ought to be joined as a party,⁸ and Rule 19(b) describes the conditions under which a suit should be dismissed if joinder is not possible.⁹

⁸ Rule 19(a) states:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest * * *.

⁹ Rule 19(b) states:

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and

The United States is a party that should be joined under Rule 19(a), because it has an "interest" relating to petitioners' suits against the Native corporations that would be impaired if petitioners were to prevail on the merits of their claims against the corporations. This interest arises primarily from Sections 12 and 14 of ANCSA, 43 U.S.C. 1611 and 1613, which entitled Eklutna to receive 92,160 acres of land from the United States.¹⁰ The parcels at issue in this case have been selected by Eklutna under those provisions of ANCSA. Under the administrative scheme adopted by the Secretary to implement ANCSA, if petitioners succeed in this case and thereby deprive Eklutna of its title to the land, Eklutna would be entitled to receive other land from the United States to compensate for that loss of its statutory entitlement.¹¹ Petitioners in fact ex-

good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

¹⁰ Generally, respondent Cook Inlet is entitled to the mineral rights in the land selected by Eklutna. See 43 U.S.C. 1613(f).

¹¹ Under regulations implementing ANCSA, Native corporations were permitted to "overselect" lands prior to the December 18, 1974 statutory selection deadline in 43 U.S.C. 1611(a). As a result, if certain of the lands selected by a corporation proved to be unavailable (e.g., because of prior existing rights), the corporation would have an opportunity to receive other lands from among those it had "overselected" as insurance against that eventuality. See 43 C.F.R. 2651.4(f), 2652.3(f).

pressly conceded as much in the court of appeals.¹² As a result, whether the United States will be deprived of additional land depends precisely on whether petitioners prevail in their suits against the respondent Native corporations. See *Provident Bank v. Patterson*, 390 U.S. 102, 108 (1968).¹³

Rule 19(b) provides that if a person described in Rule 19(a) cannot be made a party, the court must determine whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Rule 19(b) identifies four factors that are "include[d]" among those that must be considered in making this determination. The first factor is the extent to

¹² Petitioners acknowledged that by virtue of the "overselection" procedure discussed in note 11, *supra*, the respondent Native corporations would be entitled to receive additional land from the United States if petitioners prevailed on their claims against the corporations (C.A. Br. 38 (footnotes omitted)):

The fact is that appellees' entitlements will not be reduced. Since withdrawals and selections under ANCSA are to be from "public lands", §§ 3(e), 11 and 12 of ANCSA, appellants' lands could not be counted against Eklutna/Cook Inlet's total entitlement. Eklutna/Cook Inlet are entitled to other lands up to their full acreage entitlements, and were entitled to overselect for this purpose. 43 CFR 2651.4(f).

¹³ The United States comes within the scope of Rule 19(a) on another basis as well. The resolution of these cases would turn on a variety of factual and legal issues that directly implicate the interests of the United States — *e.g.*, whether the Secretary of the Interior erred when he determined that the land within the withdrawal area was not available for homestead entry, whether petitioners otherwise complied with the homestead laws, whether other persons would have had superior claims to the land, and whether petitioners abandoned their claims in the 1960's. In the normal course, all of these questions would be decided by the Secretary in the first instance under the doctrine of primary jurisdiction (see, *e.g.*, *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956); *United States v. Yellow Freight Systems, Inc.*, 762 F.2d 737, 739 (9th Cir. 1985)), and the Secretary of the Interior would be a party to any suit seeking judicial review of those decisions.

which a judgment will prejudice the absent party. Here, the prejudice to the United States is clear, and indeed was conceded by petitioners below. As we have just explained, if petitioners prevail in their suits against the Native corporations, the United States stands to lose title to an equivalent amount of land.

The second factor Rule 19(b) makes relevant is whether relief may be shaped to lessen the harm to the absent party. In this case, there would appear to be no way in which the United States' interests could be adequately protected by careful tailoring of the decree. Petitioners seek a ruling that the Native corporations hold the parcels in constructive trust for the benefit of petitioners and a judgment requiring the corporations to convey legal title to petitioners. If the district court were to enter such an order, the necessary consequence for the United States would be to trigger a claim for additional acreage by the Native corporations under the ANCSA selection procedures. Petitioners do not contend that the decree should be shaped to prevent that result by requiring the respondent Native corporations, rather than the United States, to bear the loss. That result would be unfair, since petitioners do not contend that the Native corporations were at fault; any alleged legal error in the circumstances of this case instead is attributable to the federal government in its administration of the public land laws.

The other two factors mentioned in Rule 19(b) are whether a judgment rendered in the United States' absence would be adequate and whether the plaintiff would have an adequate remedy if the action is dismissed for non-joinder. These factors to some extent weigh in favor of allowing petitioners' suits against the Native corporations to proceed. We note, however, that the latter factor is scarcely compelling, because petitioners in fact *did* have an adequate remedy—a suit against the United States

under the QTA — but they voluntarily allowed the time for filing such a suit to expire.

In the end, Rule 19(b) requires a court to rely on “equity and good conscience” in determining whether a suit should be dismissed because of the absence of a necessary party. In this case, petitioners’ problems are of their own making. At least by 1964, petitioners knew of the Interior Department’s position that the land was not available for homesteading, yet they failed to bring any suit seeking judicial review of the Department’s decision for more than 15 years. If petitioners had sued in a timely manner and prevailed, the parcels in question could have been excluded from the grants to the Native corporations, and the rights of the corporations would not have been implicated. And if petitioners had sued in a timely manner, the United States or the Secretary of the Interior could have been named as a defendant. In light of petitioners’ lack of diligence, the court of appeals’ conclusion that the United States is an indispensable party in this suit is amply supported by “equity and good conscience.”

In any event, the question whether the particular statutory and regulatory provisions implementing the selection rights of Native corporations under ANCSA render the United States an indispensable party to this suit is not one of general importance warranting review by this Court. The statutory deadline for Native corporations to make selections of land under ANCSA was December 18, 1974 (43 U.S.C. 1611(a)), and suits challenging the Secretary’s decisions with respect to such selections are barred unless filed within two years of the decision or December 2, 1980, whichever is later (43 U.S.C. 1632(a)). The issue presented here therefore cannot be expected to arise with any frequency in the future.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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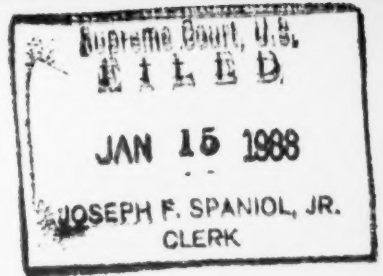
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DECEMBER 1987

No. 87-642



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES W. LEE, RALPH A. EKLUND
and CORA CARR,

Petitioners,

v.

EKLUTNA, INC., COOK INLET
REGION, INC., UNITED STATES OF
AMERICA, SECRETARY OF THE
INTERIOR, and DIRECTOR,
BUREAU OF LAND MANAGEMENT,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS'
OPPOSITIONS TO PETITION FOR CERTIORARI

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**PETITIONERS' REPLY TO RESPONDENTS'
OPPOSITIONS TO PETITION FOR CERTIORARI**

Respondents offer no argument or authority in support of the Ninth Circuit of Appeals' theory (809 F.2d 1411) that Petitioners' causes of action for three specified homestead land parcels in the Eagle River Valley, Alaska, were actions against the United States arising under the Quiet Title Act of 1972 ("QTA"), 28 U.S.C. §2409a and time-limited by §2409a(g) thereof. Respondents thus tacitly concede that the Court of Appeals was wrong as a matter of law. Respondents' replies offer an entirely distinct theory which involves claims not pleaded by them, which is illogical, and which is unsupported by statute or by case authority.

The United States' brief in opposition characterizes the issue as

2. Whether the United States is an indispensable party to petitioners' suit against the respondent Alaska Native corporations that hold the disputed land under patents issued by the United States pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 et seq., because, under ANCSA, the effect of a judgment in petitioners' favor would be to enable the Native corporations to obtain additional land from the United States.

United States' brief in opposition to certiorari at page (I); emphasis supplied. Respondents' fatal assumption is that if the United States can somehow be made an indispensable party under any theory of joinder, that is enough to lead to dismissal under the Quiet Title Act's statute of limitations. This simplistic argument ignores the fact that joinder of the United States as an indispensable party on Respondents' third-party theory does not make the United States an indispensable party to Petitioners' causes of action.

Respondents' argument ignores the fact that the Ninth Circuit's dismissal was based not simply on the alleged indispensability of the United States under Civil Rule 19 (joinder of persons for just adjudication) but the Court of Appeals' belief that the United States was the essential party defendant which Petitioners must sue for their own lands.

Both Respondents claim that the United States becomes an indispensable party on an indemnity lands theory (Eklutna as a third party plaintiff and the United States as a third party defendant) whereas, in contrast, the Court of Appeals reasoned that the United States was an indispensable party defendant to petitioners' claims for title against Eklutna/Cook Inlet ("Lee, Eklund and Carr can only properly establish their asserted entitlement to the disput-

ed lands in direct proceedings against the United States.". 809 F.2d 1411.)). The difference between these two theories is gross. Even if Respondents' theory of the United States' indispensability as a third party defendant is correct, that theory does not make the United States an indispensable party (under the QTA or otherwise) to Petitioners' direct title causes of action against Eklutna and Cook Inlet. Hence 28 U.S.C. §2409a(g) does not apply to Petitioners' claims against Eklutna/Cook Inlet -- the essential basis of the Ninth Circuit's ruling at 809 F.2d 1406.

For that matter, Respondents' third-party theory does not imply that 28 U.S.C. §2409a(g) bars any claims which Eklutna/Cook Inlet may have against the United States for indemnity lands. Eklutna has not identified any accrual

time of such claims but that time could be no earlier than 1979, when Eklutna/Cook Inlet first received patents, i.e., when they first arguably suffered any loss of their lands by reason of their liability to Lee, Eklund or Carr for the Eagle River land parcels. Sabat v. Pennsylvania R. Co., 157 F.Supp. 325, 327 (D.C. N.Y. 1958).

"The running of the statute of limitations on any claims that plaintiff might have against a third-party defendant should have no effect on defendant's right to implead.[citing cases]". Wright and Miller, Federal Practice and Procedure, §1447. Any third party claim which Eklutna/Cook Inlete may have against the United States is not barred simply because Petitioners' alternative causes of action in the district court against the United States may be barred under

§2409a(g). The fact remains that the United States is not an indispensable party to Petitioners' principal causes of action, i.e., their direct title claims against Eklutna/Cook Inlet, for the reasons given in the Petition. See also Tyler v. Judges of the Court of Registration, 179 U.S. 405 (1900). Such claims are therefore not affected by §2409a(g) in the first instance, a point which Respondents do not dispute. See, in a comparable situation, United States v. State of Illinois, 454 F.2d 297, 301 (7th Cir. 1971) (defendant could implead a state even though plaintiffs could not have done so; "We find no sound basis for a contrary result based on the nebulous theory that the original action was 'commenced' by other plaintiffs.") The bringing in of a third party defendant does not make him a defendant as against

the original plaintiff, but only as against the third party plaintiff. Smith v. Philadelphia Transp. Co., 173 F.2d 721, 724 n.1 (3rd Cir. 1949).

For the purposes of this reply, Petitioners will assume that Eklutna hypothetically would have a valid claim against the United States for such "additional" lands under an indemnity theory and that the United States could be made an indispensable party if Eklutna had asserted against the United States a third party cause of action for such lands. It does not follow from such assumptions that this has the effect of causing the QTA's statute of limitations, 28 U.S.C. §2409a(g) to apply to Petitioners' title causes of action against Eklutna/Cook Inlet. This is clearly established as a matter of federal law. Wright and Miller, Federal Practice and

Procedure, §1447 (emphasizing "importance of carefully distinguishing among different limitation periods in a case involving multiple claims or parties").

Thus, Petitioners' title claims are not time-barred. Respondents did not plead or otherwise assert any third party cause of action for indemnity lands in the district court. This omission was not Petitioners' fault. Had Eklutna/Cook Inlet chosen to do so, they could have asserted these claims in the district court under Rule 19 without prejudicing Petitioners' claims against them. Their failure to do so should not prevent Petitioners from enforcing their equitable rights to the Eagle River lands.

Respondents make other factual and legal assertions. These contentions are not properly before this Court since (1) the court below expressly refused to

reach these issues because of its holding that Petitioners' title claims against the private party defendants were barred by 28 U.S.C. §2409a(g) (809 F.2d 1408) and (2) they are not fairly included within the questions presented for review in this petition for certiorari. Indeed, review of the Ninth Circuit's decision and reversal thereof by this Court would permit this case to be returned to the lower courts so that such courts could address the merits of these questions. However, Petitioners expressly deny that Petitioners entered into any compromises or that there was any "deficit" in their proof of compliance with the homestead laws, 43 U.S.C. §161 et seq. The delay claimed by Eklutna was the direct product of the BLM's misrepresentation of the status of the land and the Secretary's denial of wrongdoing. As a matter of

federal law, moreover, a person is entitled to commence suit against a patentee once the patent is issued to someone else. Since the decision to patent the land to someone rests in the hands of the government, Lee, Eklund and Carr cannot be blamed for the resulting delay. United States v. Schurz, 102 U.S. 378 (1880).

The United States also claims that the United States is a necessary party because the Secretary of Interior's errors are under review. United States' brief in opposition at page 14, note 13. Petitioners note that neither the United States nor any federal officer need be a party for such review to occur. In all cases already cited by Petitioners, e.g., Shepley v. Cowan at 91 U.S. 340 (because the BLM "err[ed] in the construction of the law applicable to

[the] case" Secretary's action "may be reviewed and annulled by the courts when a controversy arises between private parties founded upon [his] decisions") the Secretary's decisions were the subject of review although neither the United States nor the Secretary was a defendant. See in addition, Litchfield v. Richards, 76 U.S. 575 (1870).

The presence of the Secretary as a party, even were it required in the first instance, would not implicate 28 U.S.C. §2409a(g) (the essential basis of the Ninth Circuit's opinion) because the United States claims no interest in the land in dispute between petitioner and private party respondents, Eklutna/Cook Inlet. It is noted that the Ninth Circuit itself has held that there is no time limit on the review of the Secretary's decisions. Coleman v.

United States, 363 F.2d 190, 196 (9th Cir. 1966), United States v. Webb, 655 F.2d 977 (9th Cir. 1981).

Respondents claim that United States v. Midwest Oil, 236 U.S. 459 (1915) and Shiny Rock Mining Corp. v. United States, 825 F.2d 216 (9th Cir. 1987) save the Secretary's 1959 letter from being a misrepresentation of the status of the lands under §24 FPA. Midwest Oil merely held that the Secretary has discretion to withdraw lands temporarily, but not to the extent that a specific statute such as §24 FPA commands otherwise. "Instructions", (Acting Secretary of Interior Ryan) 33 I.D. 104 (1904); see also authorities listed in the following paragraph.

Respondents have not shown that the alleged "tractbook rule" (Shiny Rock) was not satisfied. Moreover, the "tract-

book rule" does not apply where claimants make a contemporaneous demand for the land and where the Secretary disobeys a specific statutory command to accept entry on the land, i.e., he cannot withhold land from homestead entry by a unilateral disobedience of the applicable statute governing the land. See Shiny Rock, supra, and Hannibal & St. Louis R.R. Co. v. Smith, 9 Wall. 95 (1869), Van Wyck v. Knevals, 16 Otto. 360 (1882), United States v. Minnesota, 270 U.S. 181 (1925), Stockley v. United States, 260 U.S. 531, 541 (1922)("It would be manifestly unjust to make the right to a patent dependent upon the administrative action of the register, subjecting it to such delays as are incident to the conduct of public business and over which the claimant has no control"), Ferry v. Udall, 336 F.2d 706, 713 (9th Cir. 1964)

(same), Pecard v. Camens, 4 I.D. 152
(1885)(same).

Lastly, Eklutna states in its brief at page 15, "claimants were represented by legal counsel and refused to appeal adverse decisions". There is no evidence wehatsoever that Eklund or Carr were represented by legal counsel at any time before instituting their district court actions in 1980 and 1982, respectively. Lee was assisted by an attorney in 1963 only as to the determination of the boundary line between the portion of his 160 acre claim inside the alleged power reserve, and the portion outside. See BLM file A034310, district court docket No. 87, memo of July 22, 1963. There is no evidence that Lee's then attorney was ever apprised of the Federal Power Commission's no-injury determination DA-59-Alaska, made pursuant to 16 U.S.C.

§818.

Lee, Eklund and Carr appealed their cases all the way to the Secretary of the Interior in 1959. Exhibit K to part (D) of district court docket No. 108, which led to the letter described at page 5 of the Petition herein. 43 CFR §221.37 (1957) provided that no further appeal would lie from the Secretary's decision.

Eklutna argues that 28 U.S.C. §2409a(g) should not be tolled because it is jurisdictional. This Court has already determined, however, that the Congressional waiver of sovereign immunity should not be construed to narrow the waiver that Congress intended. United States v. Kubrick, 444 U.S. 111, 118 (1979), Bowen v. City of New York, 106 S.Ct. 2022, 2029 (1986). In applying this principle, the Quiet Title Act's statute of limitations should not be ex-

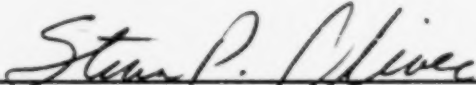
tended to apply to any actions other than those to which Congress clearly contemplated that it apply, namely actions involving claims to land in which the United States claimed an interest. Under this principle, Petitioners' claims clearly are not barred by 28 U.S.C. §2409a(g), however much any third-party claim by Eklutna/Cook Inlet against the United States may be subject to that limitations statute.

Conclusion

For the foregoing reasons this Court should conclude that Respondents are unable to offer any reason in support of the jurisdictional dismissal of Petitioners' title claims by the Ninth Circuit Court of Appeals. Eklutna/Cook Inlet's ability to pursue their indemnity claims if Petitioners' title action is allowed to proceed. On the other hand, the Ninth

Circuit's dismissal grievously injures
Petitioners, and the decision announcing
that dismissal will stand as a backward
step in public lands and federal
government litigation in the future.
Petitioners submit that this case is
appropriate for full review by the Court
and respectfully ask that their Petition
be granted.

Respectfully submitted this 15th
day of January, 1988.



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